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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 70

IRVING J. WOLF, ET AL., PETITIONERS,

vs.

ARNOLD A. WEINSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1962
CERTIORARI GRANTED APRIL 2, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

89669

In the Matter

—of—

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

In Proceedings for the Reorganization of a Corporation

PETITION FOR REORGANIZATION UNDER CHAPTER X—
Filed September 28, 1953

To: The Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Nazareth Fair Grounds & Farmers Market, Inc. respectfully represents:

1. Your petitioner is insolvent.

2. Your petitioner is a corporation organized and existing under the laws of the State of Pennsylvania and is a corporation which could become a bankrupt under the Act of Congress relating to Bankruptcy and is not a municipal, insurance or banking corporation, or a building and loan association, or a railroad corporation authorized to file petition under Section 77 of said Act.

3. Your petitioner by resolution of the Board of Directors maintains an office at 261 Broadway, Borough of Manhattan, City and State of New York and also has an office in Nazareth, Pennsylvania.

The plurality of the stockholders the majority of the Board of Directors and officers and the two judgment creditors as hereinafter mentioned who have precipitated the necessity for applying for the Chapter X proceeding

[fol. 2] herein are also residents of the State of New York or maintain their office and are within the territorial jurisdiction of this Court, and your petitioner has and for the past six months next preceding the filing of this petition has had its meetings of the Board of Directors and stockholders within the territorial jurisdiction of this Court. That petitioner has property and choses in action having a situs within this jurisdiction.

4. The nature of the business of your petitioner is as follows: Petitioner owns real estate popularly referred to and known as "The Nazareth Fairgrounds" located at the juncture of Routes 12 and 45 in the Town of Nazareth, State of Pennsylvania, where it maintains and operates various buildings, lands and realty which it lets or rents to concessionaires, merchants, farmers and auctioneers as tenants or licensees for the purpose of selling or auctioning their wares and produce, which land and buildings are also leased for country fairs and for automobiles races and such other legal uses as are or may be permitted by law.

5. The assets and liabilities and financial condition of your petitioner are set forth on a balance sheet annexed hereto which are based on the financial report submitted by certified Public Accountants, more particularly, Siegel, Berg & Co. and which is submitted by your petitioner in reliance of such report as prepared by the said auditors which may be summarized as follows:

(a) The assets in the main, of your petitioner which have substantial value are the land, building and improvements which according to said auditors have a book value of One Hundred One Thousand and Seventy Three ($101,073.13) and 13/100 Dollars.

[fol. 3] Petitioner estimates the value of the assets, more particularly, of the realty owned by the petitioner, at approximately the sum of One Hundred Thousand ($100,000.00) Dollars although no appraisal has been made.

The foregoing should be approximately the estimated assets of petitioner.

(b) Your petitioner verily believes that the land, building and improvements owned by your petitioner have a

greater market value than the book value as stated by the accountants who prepared such financial statement. The balance of the assets representing accounts receivable, J. Malakoff may be uncollectible and in dispute as is more specifically alleged hereafter. Similarly with the item of Three Thousand Ninety Eight ($3,098.25) and 25/100 Dollars of loans and advances; except for the realty as aforementioned balance of the assets of petitioner are negligible.

(c) The latest list as of about September 21, 1953, of the liabilities of your petitioner exclusive of its capital stock as appears on the books and records of the corporation and as submitted by the accountants as of June 30, 1953 show accounts payable in the sum of Thirteen Thousand Nine Hundred Ninety One ($13,991.65) and 65/100 Dollars which includes a note payable in the sum of One Thousand ($1,000.00) Dollars. Petitioner estimates taxes due the United States Government at approximately One Thousand ($1,000.00) Dollars. Real estate taxes due to Lower Nazareth Township, Pennsylvania, in the sum of Three Hundred Fifty ($350.00) Dollars.

Insofar as items marked "other indebtedness" where same reflects notes issued by the petitioner for Thirteen [fol. 4] Thousand Six Hundred ($13,600.00) Dollars petitioner contests such judgment notes and actions are now pending in this Court in an endeavor to stay execution of such judgment notes which ultimately resulted in a judgment by the creditors thereof, more particularly, William McK. Shongut in the sum of $10,000.00 and Benjamin Margolis for $3,600.00 further details of which are hereinafter stated. There are loans payable in the sum of Fifty Four Thousand Eight Hundred Forty Two ($54,842.92) and 92/100 Dollars, which allegedly were made by John Malakoff but which petitioner contests and for which petitioner has received a release from the said John Malakoff.

Included in the liabilities as aforementioned, are notes totalling Three Thousand Eight Hundred Sixty Six ($3,866.99) and 99/100 Dollars for insurance.

There are further obligations that petitioner has, the amounts of which are undetermined at this time including services rendered by Jerome Fried for labor approximately

one and one-half years, the Board of Directors not having fixed his remuneration which can be estimated at about One Hundred ($100.00) Dollars per week, which would be a further indebtedness of petitioner for about Seven Thousand Eight Hundred ($7,800.00) Dollars.

[fol. 5] The books reflect additional liabilities in the form of checks issued, more particularly, a check to one, N. Manochihrian for One Thousand ($1,000.00) Dollars and a note for Five Thousand ($5,000.00) Dollars to one, Seymour Forman which petitioner is contesting and has refused to pay as more specifically is explained hereafter.

The total amount of indebtedness acknowledged by petitioner is estimated at approximately the sum of Fifteen Thousand Three Hundred Forty One ($15,341.65) and 65/100 Dollars.

The foregoing is exclusive of such amounts of indebtedness as petitioner claims as meritorious defenses and offsets and exclusive of mortgages in the total sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars.

That petitioner has determined from the books and records that the liabilities and estimated assets as aforementioned reflect the financial condition of petitioner as of about September 21, 1953 and that the assets and liabilities submitted substantially reflect said financial condition of petitioner.

(d) Due to the improper and illegal issuance of stock of petitioner by its former president one John Malakoff which has resulted in an action being brought in this Court in a civil part thereof, petitioner cannot fully determine all of the stock issued by petitioner and that portion of the stock that the Court might sustain as properly having been issued or not. However, according to the records of petitioner without petitioner conceding that any holder thereof is entitled to such stock except where same is subject to determination by this Court or by such other tribunal as [fol. 6] determined by this Court. It appears that there has been issued approximately Three Hundred Fifteen (315) shares of capital stock by petitioner of no par value. On knowledge and information sufficient to form a belief fifteen (15) shares were issued to one Seymour Forman as secur-

ity for a loan in dispute which stock certificates as issued are not reflected in the stock book of the corporation. Some of these shares of stock were allegedly sold at Six Hundred ($600.) Dollars per share, some were allegedly sold at One Thousand ($1,000.) Dollars per share, some as security for alleged loans in dispute, some for no consideration and some that appear to be illegally issued.

(c) The financial condition of your petitioner is fully set forth in balance sheet dated June 30, 1953 annexed hereto and made a part hereof, and the financial condition of your petitioner is substantially the same or not better than as of said date, at the present time.

6. There are no proceedings pending affecting the property of your petitioner known to it except as specified in paragraph 8 hereafter, except that one, William McK. Shongut has acquired and entered a judgment for the sum of Ten Thousand ($10,000.) Dollars in Court of Common Pleas of Northampton County, Pennsylvania, and one Benjamin Margolis has acquired a judgment in the sum of Three Thousand Six Hundred ($3,600.) Dollars in Court of Common Pleas of Northampton County, Pennsylvania. That your petitioner by order to show cause dated , made an application in this District Court for a stay of levy and execution on the judgments in question alleging that such judgments were acquired by conspiracy and fraud as more specifically stated in such order to show cause and affidavits attached and in the complaint duly served on said William McK. Shongut and Benjamin Margolis. That the Hon. Justice Edward J. Dimock rendered a decision and signed an order denying the stay or injunction as to the levy and execution under such judgments unless petitioner filed a bond in the sum of Thirteen Thousand Six [fol. 7] Hundred ($13,600.). In the event petitioner did file such bond, injunction and stay of execution would naturally be in effect. However, unfortunately, petitioner has no liquid assets and no cash whatever to furnish a bond and petitioner is not in a position to ask an insurance company or bonding company to furnish a bond in order to stay the two judgments in question.

Petitioner verily believes and has so alleged by verified complaint and corroborating affidavits and memoranda and other evidences that such judgments as acquired by William McK. Shongut and Benjamin Margolis were acquired through fraud and conspiracy. That petitioner has been unable to furnish bond. If the said William McK. Shongut and Benjamin Margolis were to levy and execute on their judgments against the realty owned by petitioner and same were sold under forced sale, the result would cause irreparable harm and damage to petitioner and to creditors and stockholders of petitioner. Same would also undoubtedly create a preferential payment to the said William McK. Shongut and Benjamin Margolis in that petitioner has not sufficient liquid funds on hand to pay all of its obligations and creditors as and when same are due.

The adoption of a suitable plan of reorganization under the said Act will protect the stockholders of your petitioner and will reduce the loss of its stockholders which would otherwise result from the enforcement of creditors' claims and consequent destruction of your petitioner's business and the values of its properties. It is essential for the protection of creditors and stockholders that levying or execution on the judgments or the commencement of suits, against your petitioner be stayed pending official decree in this proceeding.

[fol. 8] A plan of reorganization can be developed and effected so as to provide for the payment in cash of all costs of administration in this proceeding and other allowances made by the Court herein, the liquidation of all of petitioner's indebtedness and the determination of the equities of stockholders and the preservation of their rights thereby averting partial loss to its creditors and total loss to its stockholders.

7. One, Seymour Forman, by an attorney who allegedly holds a promissory note for Five Thousand ($5,000.00) Dollars allegedly executed by petitioner and also holds certain certificates has also threatened suit. Petitioner verily believes it has a meritorious defense for non-payment of the note in question. Petitioner has refused to pay such note, which note was presented for payment. Suit is impending in this matter.

8. There are proceedings pending by petitioner as represented by copy of the summons and complaint on file in this Court exhibited to this Court simultaneously with this application together with the supplemental summons and complaint which was submitted to this Court for the granting of consent to petitioner to add additional defendants and to issue such supplemental summons and complaint in substance and stating generally there have been issues raised as to fraudulent transactions and conspiracies between some of the defendants herein and petitioner's former president, John Malakoff, whereby such defendants acquired stock, judgments, moneys and/or other assets of petitioner illegally. Supplemental summons and complaint were requested in order to have all the rights of all the stockholders of petitioner determined. It appearing that [fol. 9] more stock was issued by Petitioner than that authorized by its charter and that a good portion of its stock was issued illegally and fraudulently.

9. No plan of reorganization, readjustment, or liquidation affecting the property of your petitioner is pending either in action with or without any judicial proceeding, except as stated in paragraph "6" hereof.

10. The specific facts showing the need for relief under Chapter X of said Act are as follows: The estimated and approximate value of the assets of your petitioner which consist in the main of its realty holdings, petitioner would estimate at a value of One Hundred Thousand ($100,000.) Dollars the mortgages total, as of June 30, 1953, Fourteen Thousand Five Hundred ($14,500.) Dollars. Petitioner is in no position financially to presently meet all of its just liabilities and indebtednesses due because it is not in a liquid position and has not the cash available to meet same. The liabilities due exclusive of mortgages and notes are as hereinbefore mentioned. Petitioner is also unable due to its cash position and financial condition to deposit Thirteen Thousand Six Hundred ($13,600.) Dollars in order to get a continuance of the stay of the judgments fraudulently and illegally obtained against petitioner and which petitioner is contesting. Similarly, with the note executed to Seymour Forman for Five Thousand ($5,000.) Dollars

which also is in dispute, taking into consideration that petitioner's assets are fixed and frozen assets consisting of realty and in view of the liabilities aforementioned, the valid ones which are due and cannot be met, and in view of the general financial condition as heretofore submitted, petitioner needs relief under Chapter X in addition to the fact that stockholders' reorganization is necessary and their rights have to be determined. It would, therefore, appear that exclusive of the issued stock to sundry stockholders of petitioner, the legal ownership of which petitioner is not in a position to determine and your petitioner is contesting, as hereinbefore set forth and as specifically [fol. 10] set forth in the copy of summons and complaint exhibited to this Court together with copy of supplemental summons and complaint for which an order has not been signed to be issued. It would appear that the net assets of the corporation are such as would be sufficient to pay its liabilities. However, petitioner is unable to determine the true value of petitioner in that petitioner cannot determine the legality and propriety of the stock issued by petitioner illegally and fraudulently through its former president, John Malakoff, in conspiracy with others who will be brought into this proceeding and who already have been brought into a civil proceeding in this Court. Petitioner is also unable to pay its creditors in that petitioner has not the liquid cash on hand. Petitioner is also unable to furnish a bond in the sum of Thirteen Thousand Six Hundred ($13,600.00) Dollars in order to stay the execution and levy on judgments acquired fraudulently, as claimed by petitioner, by Margolis and Shongut and, in the event of a levy or forced sale or multiplicity of suits by the authorized alleged stockholders, claimants or creditors, the result of the aforementioned, inclusive of possible actions by stockholders against the corporation for moneys given to the former president, John Malakoff, would result in irreparable damage and harm to petitioner, might bring substantially less than necessary to pay petitioner's liabilities and would cause an interference and destruction in the business and property of petitioner. It would further inevitably result in loss to creditors and destruction of the rights of stockholders that this Court might determine are

legally entitled to ownership of such stock. Your petitioner [fol. 11] operates its business in Nazareth, Pennsylvania and has a great amount of good will and requires the good will of its patrons and farmers in that area and in the event there would be any levy and execution on the realty by the judgment creditors, and the business operations of petitioner would stop for any period of time, its customers who rent stalls or space in the buildings maintained by your petitioner, might seek other areas or other space for rental, to the impairment of petitioner's business.

The specific facts showing why adequate relief cannot be obtained under Chapter XI of said Act are as follows: Your petitioner cannot be reorganized with reasonable prospect of success in the continued operation of its business merely by an arrangement with its unsecured creditors due to the allegedly illegal and unauthorized or fraudulent stock issued by petitioner there has to be a determination as to the equities and the rights as to the present stock interests and a recasting of present stock interests and an alteration, modification or nullification of the rights of the unsecured creditors some of whose claims are in dispute and possibly new capital may be necessary all part of a single plan of reorganization.

11. Your petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

12. That as previously stated, petitioner is engaged in the business of renting stands and space to farmers and others, that there has been personal contact between Jerome Fried and the people in the immediate vicinity who [fol. 12] rent such space and in some instances daily, weekly and/or monthly, and that there is a great amount of good will between the said Jerome Fried and the licencees. That Arnold A. Weinstein, Esq., attorney, of 261 Broadway, in the Borough of Manhattan, City and State of New York, is president of the petitioner and has been active in the operations and conduct of the business and aiding and supervising same. That it is necessary and essential for the conduct of petitioner's business that the said Jerome Fried and Arnold A. Weinstein continue in the capacity that they

have heretofore been in and render services on behalf of petitioner during the proceeding herein. That the fair and reasonable value of the services to be rendered by the said Jerome Fried and the said Arnold A. Weinstein, would be at the rate of One Hundred ($100.00) Dollars per week each for the work, labor and services to be rendered by them, Arnold A. Weinstein, however, for the purposes of aiding the reorganization of the corporation, will draw no salary. The said Jerome Fried is at all times on the premises of petitioner and physically and actively attending to the business of petitioner and the said Arnold A. Weinstein supervising the conduct of the operation of the business, signing checks, watching the income, negotiating contracts or leases. That Arnold A. Weinstein is president of petitioner and a director, and that the other officers are: Charles Kanter, Vice-President and H. Lawrence Lopheimer, Secretary-Treasurer. That petitioner does a business of approximately Fifty Eight Thousand ($58,000.00) Dollars annually and the operating expenses exclusive of improvements on buildings and realty would be estimated at about Forty Three Thousand ($43,000.00) Dollars, leaving a net profit annually of approximately Fourteen Thou- [fol. 13] sand ($14,000.00) Dollars. That petitioner estimates that the income for the next thirty (30) days would be just under Five Thousand ($5,000.00) Dollars and that the operating expenses would be approximately Four Thousand ($4,000.00) Dollars, which operating expenses will include the wages and salary of Mr. Jerome Fried and all other incidental carrying charges such as advertising, heat, light and power, market supplies, garbage removal, insurance, interest, office expense, taxes, telephone and any other nominal incidental expense.

That there is no doubt that the petitioner can and will operate profitably during such time as petitioner is allowed to continue in possession.

Changing the personnel or the operations of business would impair the good will which is an important segment of petitioner's business. That in view of the fact that the amount due general creditors or all creditors exclusive of the capital stock issued, is only Fifteen Thousand Three Hundred Forty One ($15,341.65) and 65/100 Dollars, ex-

clusive of amounts in dispute as aforementioned, exclusive of the litigated matters and in that the operations of the business are of a personalized nature as hereinbefore mentioned, petitioner respectfully requests that the Honorable Court authorize petitioner to continue operations of the business by its officers, Arnold A. Weinstein and its operating manager, Jérome Fried.

Petitioner further requests that this Honorable Court grant leave to petitioner to pay its creditors as and when the bills become due and that petitioner knows it will operate at a profit and does not want to destroy the good will of petitioner in the area where it conducts its business.

It is petitioner's intention and petitioner will be able to pay to all creditors One Hundred (100) Cents on the Dollar, except that petitioner will contest claims of certain [fol. 14] creditors where petitioner feels it has an honest and meritorious defense and/or offset.

13. No other petition by or against your petitioner is pending under Chapter X of said Act, nor is any other bankruptcy proceeding, initiated by a petition by or against your petitioner, now pending.

Wherefore, your petitioner prays

(a) That an order be entered approving this petition.

(b) That petitioner shall continue in possession of its property and shall have all the right, title in the exercise consistently with the provisions of Chapter X of the Bankruptcy Act, all the powers of a trustee appointed pursuant to Section 44 of the Act of Congress relating to Bankruptcy.

(c) That petitioner be vested with the rights and powers of a receiver in equity appointed by the Court of the United States for petitioner's property, except such rights and powers as may be inconsistent with the provisions of Chapter X of said Act and subject, however, at all times to the control of the Court and to such limitations, restrictions, terms and conditions as the Court may from time to time prescribe.

(d) That such petitioner by Arnold A. Weinstein and Jerome Fried be authorized, directed and empowered to

operate the business and manage the property of your petitioner.

(e) That such further proceedings may be had upon this petition in accordance with the provisions of Chapter X [fol. 15] of said Act and that your petitioner have such other and further relief as is just.

Nazareth Fair Grounds & Farmers Market, Inc.,

By Arnold A. Weinstein—Pres.

Alex L. Rosen, Attorney for Petitioner, 225 Broadway, New York 7, New York.

Duly sworn to by Arnold A. Weinstein, jurat omitted in printing.

[fol. 16]

ATTACHMENT TO PETITION

Nazareth Fair Grounds & Farmers Market, Inc.

BALANCE SHEET
June 30, 1953

ASSETS

CURRENT				
Cash on hand			$ 70.25	
Accounts Receivable—J. Malakoff			11,811.78	
Unexpired Insurance			1,522.54	$ 13,404.57
PROPERTY AND EQUIPMENT				
	Cost	Acc. Dep'n	Adj. Cost	
Land	$ 6,000.00		$ 6,000.00	
Buildings	70,543.50	$6,050.11	64,493.39	
Improvements	24,529.63	2,374.70	22,154.93	
	$101,073.13	$8,424.81		92,648.32
OTHER ASSETS				
Loans and Advances (Schedule A-1)			$ 3,798.25	
Deposits			50.00	
Organization Expense			349.65	4,197.90
TOTAL ASSETS				$110,250.79

LIABILITIES AND CAPITAL

CURRENT LIABILITIES		
Cash in bank—Overdraft	301.33	
Accrued and Withheld Taxes	278.39	
Accounts Payable	9,934.87	
Accrued Payroll	253.50	
Notes Payable—		
J. Sherman (Due 8/20/53)	1,000.00	$ 11,768.09

Other Indebtedness		
First Mortgage Payable (Due 10/10/53)	$ 8,500.00	
Second Mortgage Payable (Due 4/17/56)	6,000.00	
Notes Payable—Insurance	1,220.00	
Loans Payable (See Schedule)	1,795.72	
Judgment Notes Payable	13,600.00	
Loans Payable	54,842.92	85,958.64
Reserve for Federal and State Income Taxes		3,674.69
Capital and Surplus		
Capital Stock issued—Common	$ 1,500.00	
Surplus (Schedule A-3)	7,349.37	8,849.37
Total Liabilities and Capital		$110,250.79

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Proceedings for the Reorganization of a Corporation

#89669

In the Matter

—of—

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

ORDER APPROVING PETITION—September 28, 1953

This cause having come on to be heard on the petition of Nazareth Fair Grounds & Farmers Market, Inc. the above named debtor, verified September 25th, 1953, praying that proceedings be had under Chapter X of the Act of Congress relating to Bankruptcy and it appearing that no notice of said hearing should be given, and after hearing Alex L. Rosen, Esq. attorney for the said debtor, in favor of said petition, and there having been no other appearances,

Now, upon the said petition of all the proceedings had before me at the said hearing, and the affidavit, together with six copies thereof, required by Bankruptcy Rule X-4 of this Court having been submitted, and due deliberation having been had thereon, the Court is satisfied and does find (1) that the petition of Nazareth Fair Grounds & Farmers Market, Inc. the above named debtor, verified September 25th, 1953, praying that proceedings be had under Chapter X of the Act of Congress relating to Bankruptcy, complies with the requirements of said Chapter X, and (2) that said petition has been filed in good faith; and it is

Ordered, that said petition be and it hereby is approved.

Dated: New York, New York, September 28, 1953.

Alexander Holtzoff, United States District Judge.

[fol. 18] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

#89669

In the Matter

—of—

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC., Debtor.

ORDER AUTHORIZING DEBTOR IN POSSESSION TO OPERATE BUSINESS, ETC.—September 28, 1953

At New York City, in said District, on the 28th day of September, 1953.

Upon the petition of Nazareth Fair Grounds & Farmers Market, Inc., duly verified the 25th day of September, 1953, praying that it be authorized to file a Chapter X proceeding under the Bankruptcy Act and that it be authorized to operate its business and manage its property and for such relief as therein set forth, and it appearing that no notice of a hearing thereon should be given and no adverse interest having been represented, and there having been no other appearances, and sufficient reason appearing to me therefor, it is

Now, upon said petition of all the proceedings had before me at the said hearing and the affidavit together with six copies thereof required by Bankruptcy Rule X-4 of this Court having been submitted, it is

Ordered, that the debtor in possession be and it hereby is, authorized to operate its business and manage its property pursuant to Sec. 343 of the Bankruptcy Act, until the further order of the Court, and it is further

Ordered, that the debtor in possession shall close the present books of account as of the close of business this [fol. 19] day, and shall open new books of account as of the

opening of business tomorrow, in which new books of account it shall cause to be kept proper accounts of its earnings, expenses, receipts, disbursements and all obligations incurred and transactions had in the operation of the business and the management, preservation and protection of the property of the within estate, and said debtor in possession shall preserve proper vouchers for all payments made on account of such disbursements, and it is further

Ordered, that the Nazareth Fair Grounds & Farmers Market, Inc. shall continue in possession of its property and shall have all the right and title in the exercise consistently with provisions of Chapter X of the Act, all the powers of a trustee appointed pursuant to Section 44 of said Act subject to however, at all times, the control of the Court and to such limitations, restrictions, terms and conditions as the Court may from time to time prescribe and pursuant to such limitations, restrictions and terms as are consistent with Chapter X of the Bankruptcy Act, and it is further

Ordered, that subject to the further order of the Court the said Nazareth Fair Grounds & Farmers Market, Inc. be and the same is hereby authorized to pay One Hundred ($100.00) Dollars weekly to Jerome Fried, its secretary-treasurer, and no salary to Arnold A. Weinstein, who for the purposes of aiding the reorganization of the corporation, will draw no salary, and it is further

Ordered, that the debtor in possession be, and it hereby is, authorized to pay their employees, other than officers and directors, salaries earned by them, and it is further

[fol. 20] Ordered, that during such operation and management said debtor in possession shall file, in duplicate, the following:

A verified monthly report not later than the day of each month which shall set forth a summary of the operations of the business during the preceding month and a verified statement of:

a) Receipts, from all sources, classified and balance on hand at the beginning and at the end of the month;

b) Disbursements for all purposes, classified; and

c) The amount of indebtedness incurred and remaining unpaid and contractual and other obligations assumed;

and it is further

Ordered, that the debtor in possession be, and it hereby is required to comply with Rule XI-5, Subd. 1, which requires:

A verified weekly statement of cash receipts and disbursements, setting forth the names of the persons to whom payments have been made, the amounts of the payments, the amounts of the deductions for withholding and social security taxes and whether or not such deductions have been deposited in a special account;

and the requirements of Rule XI-5, Subd. 2(d) which requires:

detailed inventory on hand at the beginning of the month and detailed inventory on hand at the end of the month;

and it is further

Ordered, that the debtor in possession shall not sell any of its assets except during the regular course of business and not less than cost and shall not hypothecate any of its assets without an order of this Court; and it is further

Ordered, that all moneys received by the debtor in possession are to be deposited in National City Bank and Trust [fol. 21] Co. of New York and to be withdrawn by checks signed by:

Arnold A. Weinstein, President and countersigned by John E. Joyce, Esq. one of the Referees in Bankruptcy

and it is further

Ordered, that Nazareth National Bank & Trust Co. located in Nazareth, Pennsylvania be and hereby is, directed to transfer to the account of Nazareth Fair Grounds & Farmers Market, Inc., debtor in possession, all moneys now on deposit in the name of Nazareth Fair Grounds & Farmers Market, Inc., whether special or regular accounts; and it is further

Ordered, that the debtor in possession, Nazareth Fair Grounds & Farmers Market, Inc., is hereby directed and required to segregate and hold separate and apart from all other funds all moneys withheld from employees or collected from others for taxes under any law of the United States or of any State or subdivision thereof, and to deposit the moneys so withheld or collected in a separate designated depository bank account, not later than within the calendar week next after such collecting or withholding. The debtor in possession shall retain such funds in such separate bank accounts pending further order of this Court, except that from said bank account to the appropriate authorities, the appropriate amounts at the times and in the manner prescribed by law; and it is further

Ordered, that at the time of making such deposit of money in a separate bank account pursuant to this order, that debtor in possession aforesaid shall notify the Direc- [fol. 22] tor of Internal Revenue for the attention of the Legal Section, of the date and place of deposit, and the amount of money deposited with respect to each item of Federal Tax upon the form furnished by the Director of Internal Revenue.

Alexander Holtzoff, United States District Judge.

[fol. 23] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

In Proceedings for the Reorganization of a Corporation

#89669

ORDER TO RESTRAIN CREDITORS FROM PROCEEDING WITH ACTIONS—September 28, 1953

At New York City in the said District, on the 28th day of September, 1953

Upon reading and filing the petition of the debtor herein duly verified the 28th day of September, 1953, and sufficient cause herein appearing, it is

Now, on motion of Alex L. Rosen, attorney for the petitioner,

Ordered, that all persons, firms and corporations, including all creditors of said petitioner and the representatives, agents, attorneys and servants of all such creditors, and all sheriffs, marshals and other officers and their deputies, representatives, and servants, are hereby jointly and severally, enjoined, restrained and stayed from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or in any way interfere with any of the property, assets or effects in the possession of said petitioner or owned by the said petitioner, and in possession of any officers, agents, attorneys or representatives of said petitioner, and all said persons are further enjoined, stayed and restrained from executing or issuing or causing the execution or issuance or the suing out of any court of any writ, process, summons, attachment, replevin, execution or any other proceedings for the purpose of impounding or taking possession of or interference with any [fol. 24] property owned by or in the possession of the

said petitioner and in the possession of any agents, servants or attorney of said petitioner and each and all of said persons, firms or corporations having process against the petitioner are hereby jointly and severally restrained, stayed and enjoined from taking any steps, measures or proceedings or doing any act or thing in any action wherein the said petitioner may be either plaintiff, defendant, petitioner or respondent and from causing, procuring, suffering or permitting the same to be done, other than suits to enforce liens upon the property of the petitioner; and it is further

Ordered, that all persons, firms and corporations be, and they hereby are, enjoined from disturbing or interfering with gas, telephone service, heat, electrical service, water supply, or any other utility of like kind furnished to said petitioner, and are hereby enjoined from cutting off or disconnecting the furnishing of any such utilities to said petitioner until further order of this Court.

Alexander Holtzoff, U.S.D.J.

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER APPROVING COMPENSATION, ETC.—April 28, 1955

At New York City in said District on the 28th day of April, 1955.

Debtor in Possession having duly brought on for hearing before this Court on the 20th day of April, 1955, a petition and motion to authorize the Debtor in Possession to pay the sum of $150.00 per week to Jerome Fried as and for services to be rendered by him as general manager in charge of operations of Debtor in Possession, and the sum of $50.00 per week to Arnold A. Weinstein for services to be rendered by him,

Now, upon reading and filing the order to show cause herein made on the 12th day of April, 1955 by the undersigned District Judge, the petition of the Debtor in Possession, by Arnold A. Weinstein, duly sworn to the 11th day of April, 1955 and the affidavit of service of Anna E. Luby of the notice of hearing mailed pursuant to the order of this Court, sworn to the 15th day of April, 1955, all in support of said motion, and upon reading and filing the affidavit in opposition of Benjamin Margolis, on his behalf and as attorney for Ida Mae Margolis and Sarah Kason, sworn to the 19th day of April, 1955, in opposition to said motion, and after hearing Alex L. Rosen, Esq., attorney for the Debtor in Possession, in favor of said application and Benjamin Margolis, in opposition thereto, it is

[fol. 26] Ordered that the petition of the Debtor in Possession be and the same is hereby granted as follows:

That the Debtor in Possession be and the same is hereby authorized to pay Jerome Fried, commencing with the 1st day of May, 1955, the sum of $150.00 per week as and for the services to be rendered by the said Jerome Fried for and on behalf of the Debtor in Possession as general manager in charge of operation of the business operated by the Debtor in Position, and it is further

Ordered that the decision of this Court be reserved on the application of the Debtor in Possession for the payment of $50.00 per week for the services to be rendered by Arnold A. Weinstein, to the Debtor in Possession.

Sidney Sugarman, U.S.D.J.

[fol. 27]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

Debtor in Possession

ORDER TO ALLOW COMPENSATION FOR OFFICER-EMPLOYEE OF DEBTOR—May 19, 1955

The petition of the debtor in possession to approve the resolution of its Board of Directors passed on April 5, 1955 to pay to Arnold Weinstein, President, the sum of $50.00 per week for services to be rendered from that date and subject to modification by the court while the reorganization is pending, is granted.

It appears that the sum authorized by the Board of Directors to be paid for the services set forth in Weinstein's affidavit dated April 11, 1955 is fair and reasonable. Bankruptcy Act §191.

Settle order.

Dated: May 19, 1955
New York, New York

Sidney Sugarman, United States District Judge.

Memo. Endorsed

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 89669—1953

[Title omitted]

ORDER TO SHOW CAUSE—December 28, 1955

At New York in said District on the 28th day of December, 1955.

Upon the annexed petition of the Debtor in Possession by Arnold A. Weinstein, its president, duly sworn to the 27th day of December, 1955, upon the affidavit of Jerome Fried, Manager of the Debtor in Possession, sworn to the 24th day of December, 1955 and upon all the proceedings had herein,

Ordered that all claimants who have heretofore filed claims in the above proceeding show cause at a term of this Court to be held on the 12th day of January, 1956 at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard in Room 2804 United States Court House, Foley Square, Borough of Manhattan, City and State of New York, as to why the following orders should not be granted and why the petitioner should not be granted the following relief:

1. Authorizing additional expenditures to be made and already incurred by the Debtor in the sum of $6641.41.

2. Granting leave to the Debtor in Possession to compromise and settle the claim against the State of Pennsylvania for condemnation of approximately one-third of an acre owned by the Debtor in Possession for the sum of $8000.

3. Granting leave to the Debtor in Possession to increase the salary paid to Jerome Fried for acting as Manager of the Debtor in Possession from the sum of $150.00 to the sum of $200.00 per week.

[fol. 29] 4. Granting leave to the Debtor in Possession to finance a five year payment of insurance premiums. And for such other and further relief as may be just in the premises and as demanded in the petition, and it is further

Ordered that the Debtor in Possession may serve notice of the application herein, a copy of which notice is hereto attached, by mail, to be forwarded to all claimants who have filed claims heretofore in this proceeding on or before the 30th day of December, 1955 and that the mailing of such notice shall be deemed proper and sufficient service thereof.

Sidney Sugarman, U.S.D.J.

[fol. 30]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF ARNOLD A. WEINSTEIN

To the Honorable Judge Sidney Sugarman, Judge of the United States District Court for the Southern District of New York:

The petition of Nazareth Fair Grounds & Farmers Market, Inc., Debtor in Possession, by Arnold A. Weinstein, its President, respectfully shows:

Additional Cost of Construction

1—That heretofore and on the 4th day of January, 1955, this Court signed an order permitting the Debtor in Possession to construct a building connecting two of the existing structures on the premises of the Debtor in Possession in Nazareth, Pennsylvania.

2—That pursuant to the aforesaid order, the Debtor in Possession was authorized to expend the sum of $26,000.00 for the construction purpose aforesaid; that the total cost of the newly constructed building was $32,641.41.

3—That the construction cost of the aforesaid building entailed additional expense of $6,729.58 which was not anticipated.

4—That the aforesaid increase was occasioned by a demand for space by additional tenants during the course of construction which entailed making the building larger than originally planned. Petitioner had no time because of the [fol. 31] circumstances to apply for further leave of the Court. There were also unanticipated materials and labor costs as more specifically set forth in the affidavit of Jerome Fried which is annexed hereto and made part of this petition.

5—That the new building contains approximately 21,000 square feet as against approximately 18,500 square feet contemplated under the previous order of this Court. Despite the unanticipated expense, the construction cost of the building breaks down to approximately $1.50 per square foot which was the estimated cost previously presented to the Court.

6—That the new building is fully rented and the following is the monthly rent roll thereof:

Leslie Drugs	$ 250.
Phillipsburg Grocer	$ 275.
Dress Store	$ 125.
Army & Navy Store	$ 150.
Wanko	$ 80.
Mink	$ 80.
Champion Sales	$ 80.
Herman	$ 40.
Bentz	$ 43.
Homeward Step	$ 32.
Kornfield	$ 40.
Joyce	$ 40.
Stever & Achey	$ 212.
Zimanski	$ 20.
Klein	$ 173.
DeCarlo	$ 85.
Average Transients	$ 80.
Average Concession percentage	$ 100.
	$1905.

7—That by reason of the foregoing, the annual rent roll of the new building is $22,860.00; that the ground upon which the new building stands previously brought in rents of approximately $3,000.00 per year leaving the sum of $19,860.00 as additional yearly rental actually being received by the Debtor in Possession as a result of the new construction.

[fol. 32] Condemnation

8—Heretofore, and prior to this Chapter X, proceeding, the State of Pennsylvania condemned a portion of the Debtor's property fronting Pennsylvania Route #12 for the purpose of widening the highway. The condemned strip was approximately 15 feet deep by 1,000 feet in length running along the highway.

9—For the purpose of ascertaining the value of this property, the Debtor applied to this Court for the appointment of an appraiser so that it could be guided in making an adjustment of its claim against the State of Pennsylvania. One J. M. Brandau, an appraiser from Easton, Pennsylvania was so designated. Mr. Brandau submitted an appraisal of $20,000.00 for the condemned strip. This appraisal was submitted to the Local Highway Officials in Pennsylvania who disagreed with it and submitted their own appraisal of $3,000.00 which was offered in settlement of the matter.

10—The $3,000.00 offer by the State of Pennsylvania was submitted to the Board of Directors of the Debtor and was refused. Thereafter, Alex L. Rosen, Esq. attempted to litigate the matter in this Court rather than proceed with a cumbersome and time consuming procedure in the Courts of Pennsylvania. With this in mind, a counterclaim for $20,000.00 was interposed by the Debtor against the Tax Claim filed in this reorganization proceeding by the State of Pennsylvania. Thereafter, Mr. Rosen and your petitioner were referred to the Attorney General of the State of Pennsylvania, who in turn referred the matter to the State Highway Superintendent. A conference was had in the State Capital in Harrisburg which was attended by

Mr. Rosen and Arnold A. Weinstein, after which the matter was resubmitted to the Local Officials by the Highway Su-
[fol. 33] perintendent. A further conference was thereafter held at the premises of the Debtor at which the condemned strip was examined and visually surveyed. An offer was then submitted by the State of Pennsylvania in the sum of $5,000.00. This offer was refused and a further and final offer of $8,000.00 was made.

11—The offer of $8,000.00 has been considered by the Debtor's Board of Directors and has been found to be acceptable subject to the approval of this Court.

12—It is felt that the $8,000.00 should be accepted despite the appraisal of $20,000.00 submitted by Mr. Brandau. It is to be borne in mind that the Debtor still has its original frontage along the highway and there has been no cut off or obstacle to the Debtor as to such highway. The only difference is that the property line has been pushed back some 15 feet. It appears that the rule in Pennsylvania on condemnation is to pay the difference between the market value before and after the taking. In view of the fact that the premises of the Debtor consists of approximately 31 acres, the land of which has been valued by Mr. Brandau at $100,000.00, it is difficult to understand how the taking of 15,000 square feet equal to one-third of an acre, can reduce the market value by $20,000.00 leaving a present value of $80,000.00 for the land.

13—Another reason for accepting the offer of $8,000.00 is the problem presented in litigating the condemnation in this Court. Whether this Court has jurisdiction to try the Debtor's counterclaim is a matter of first impression and, if pursued, may be taken to the Supreme Court of the United States by the State of Pennsylvania. This will delay the winding up of the reorganization proceeding. On the other hand, even if the Debtor should pursue its remedy in
[fol. 34] the first instance by applying to the State Courts of Pennsylvania, it will be at least two years before the matter can be disposed of; so that in either event an inordinate amount of time will be spent in the matter and the reorganization will be held up pending this resolution.

14—Furthermore, local counsel will have to be retained for the purpose of litigating the condemnation. Fees in such matters range from 25 per cent. to 40 per cent. on a contingency basis. The judgment in litigation might be even less than the $8,000.00 offered. Under all of the circumstances, the ultimate result in litigation might equal, or even be less than, the $8,000.00 offered by the State of Pennsylvania and, to boot, the Debtor will have been delayed in reorganization to its obvious damage.

It is respectfully requested that leave to compromise the aforesaid condemnation claim in the sum of $8,000.00 be authorized to the end that the best interests of the Debtor will thereby be served and to the further end that the assets of the Debtor will be conserved.

Increase in Salary for General Manager

15—When the petition for reorganization was first presented, the Debtor had Jerome Fried in its employ as general manager. Upon entertaining the petition the Honorable Justice Alexander Holtzoff fixed the salary payable to Mr. Fried at $100.00 per week. Thereafter, by order of this Court dated April 28th, 1955, the salary payable to Mr. Fried was raised to $150.00 per week in line with a resolution of the Debtor's Board of Directors, dated April 4th, 1955, made subject to the approval of the Court.

[fol. 35] 16—The resolution also recited that in the event the Debtor's income, viewed after the ensuing four months' operations, rose to $85,000.00 annually, then the Debtor in Possession would apply to this Court for an increase of $50.00 in the salary payable to Mr. Fried.

17—It appears that the Debtor is presently operating at a gross income rate of more than $85,000.00 annually. This is to be compared with a gross of $63,371.50 for the fiscal year 1954-1955. The increased income is due in greater part to the income resulting from the new building at the Market.

18—Mr. Fried has continued to render the services set out in the petition addressed to this Court under date of

April 11th, 1955. Moreover, it must be recognized that because of his excellent services in handling and supervising construction, the new building cost at least $20,000.00 less than would have had to be paid to a general contractor. In a sense, therefore, Mr. Fried has more than earned the increase in salary for which application is hereby made. Moreover, based upon the caliber and amount of services he renders, Mr. Fried is deserving of the $50.00 weekly increase in his salary.

Mr. Fried had expressed his willingness for a limited time to accept the aforesaid $150.00 as his weekly salary in the hope that this Chapter X. proceeding would be speedily terminated. However, because of delays in this proceeding which were not caused by the Debtor, it appears that the proceeding may take a considerable time in addition to the time already spent in reorganizing the Debtor. The Debtor is in need of the services of Mr. Fried who refused to continue as general manager on his present rate of compensation. The Debtor cannot replace this manager [fol. 36] who has established excellent personal relations with the numerous tenants at the premises of the Debtor and who has experience with the local conditions which prevail at the Market.

It is important for the purpose of conserving the assets of the Debtor including the maintenance of the good-will which has been established that Mr. Fried's salary be raised by the sum of $50.00 per week. The approval of this increase in salary would be in the best interests of the Debtor.

Insurance Financing

19—The Debtor in Possession is desirous of obtaining coverage under the following insurance policies each of which is for a term of 5 years, except the last three liability policies which are for one year:

F 1229947	American Automobile	Bldgs. (fire)	3,300.	265.00
4490911	The Home Ins. Co.	Bldg.—Fire & EC	2,500.	140.00
M 437059	World Fire & Marine	Bldg.—Fire & EC	2,500.	140.00
207506	Ins. Co. of North Am.	" " " "	7,500.	426.00
317753	North River Ins.	" " " "	2,500.	140.00
73-662	Globe & Republic	" " " "	7,500.	912.00
CAM 8002F	Underwriters at London	Fire & Lighting EC	72,000.	5212.80
AL 5123 F	" " "	Rents Form	20,000.	796.40
22 86 30	Rochester-American	Bldg.—Fire & EC	2,500.	140.00
41190	C. E. Heath & Co. Ltd.	Fire & EC	50,000.	2800.00

Total Premium	$10,966.80
Interest	877.20
Balance Due	$11,844.00

Down Payment	$2,220.75	Due December 31
(39) Payments	246.75	Due Monthly thereafter

[fol. 37]

C 79827	Newhouse & Hawley	O.L.&T	B.I. 15/30 Excess 5/10,000 P.D. 5000.00	$360.50
C 763582	Newhouse & Hawley	O.L.&T	Excess OLT 30/60 Publ. Liab. 20/40	$180.25
C 763561	Newhouse & Hawley	O.L.&T	B.I. 5/10,000 P.D. 5000.00	$772.50

Total premium	$1313.25	
Interest	23.15	
	$1336.40	
Down payment	$834.25	due December 31
(3) payments	167.05	due monthly thereafter

20—It is possible to save a considerable sum of money, equal to the premiums for one year, by taking the policies out for a five year term rather than for one year. This may be done by financing the payment of premiums on the forms and in the manner required by the Carriers in question.

21—The insurance hereinabove set forth is necessary for the protection of the Debtor and request is hereby made for leave to finance the premiums therefor upon the Debtor's undertaking to pay the same as set forth in the schedules above.

• • • • • • •

22—All of the relief requested herein is in the best interests of the Debtor.

23—That no previous application has heretofore been made for the relief requested herein except as may have been hereinabove set forth.

Wherefore, petitioner respectfully prays for an order:

[fol. 38] 1) Authorizing the expenditure of a total sum of $32,641.41 on account of the newly constructed building on the premises of the Debtor in Possession,

2) Granting leave to compromise for $8,000.00 the condemnation claim held by the Debtor in Possession against the State of Pennsylvania,

3) Granting leave to increase by $50.00 weekly salary payable to Jerome Fried,

4) Granting leave to the Debtor in Possession to finance the aforesaid insurance policies over a Five year period.

Dated, New York, December 27, 1955.

Nazareth Fair Grounds & Farmers Market, Inc.,

By Arnold A. Weinstein, President.

[fol. 39]
State of New York,
County of New York, ss.

Arnold A. Weinstein being duly sworn, deposes and says, that he is the President of Nazareth Fair Grounds & Farmers Market, Inc., the corporation named in the within entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Nazareth Fair Grounds & Farmers Market, Inc. is because said Debtor in Possession

is a corporation and deponent is an officer thereof, to wit, its President.

Arnold A. Weinstein

Sworn to before me this 27th day of December 1955.

Marvin N. Rosen, Notary Public, State of New York, No. 31-3348685, Qualified in New York County, Term expires March 30, 1957.

[fol. 40]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization

In the Matter of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.,

Debtor in Possession.

State of New York,
County of New York, ss.:

Arnold A. Weinstein, being duly sworn, deposes and says:

That the Debtor-in Possession has not made application for the relief herein demanded and that the matter herein is being brought on by Order to Show Cause in lieu of Notice of Motion, in that there are some creditors to whom there are monies due for credit extended in the additional construction made by the Debtor in Possession on the premises owned and constructed by the Debtor in Possession and in that an arrangement is to be made as expeditiously as possible for the payment of the five year premiums as applied for.

Arnold A. Weinstein

Sworn to before me this 27th day of December, 1955.

Marvin N. Rosen, Notary Public, State of New York, No. 31-3348685, Qualified in New York County, Term expires March 30, 1957.

[fol. 41]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.,

Debtor in Possession.

AFFIDAVIT OF JEROME FRIED

State of Pennsylvania,
County of Northampton, ss.

Jerome Fried being duly sworn deposes and says:

I am the Manager of Nazareth Fair Grounds and Farmers Market, Inc., the Debtor in Possession herein.

I have superintended the construction of the newly erected building on the premises of the Debtor in Nazareth, Pennsylvania and make this affidavit in support of the foregoing petition and in explanation of the increased costs entailed in its construction.

During the course of the construction of the new building, I received requests for space therein which was in addition to the Tenants who had previously agreed to take space. Because of this, the building was constructed approximately 2500 square feet larger than had originally been planned and consequently added to the cost of construction.

Other matters also added to the total cost. The original estimate for the construction of the new building was made in October, 1954. It was anticipated that actual construction could be started on or about December 1st, 1954 when the weather was not too cold and the ground not frozen. Moreover, it was anticipated that ground fill could be ob-

tained without cost to the Debtor. However, obtaining [fol. 42] Court approval for the construction was delayed until January, 1955 by reason of the opposition of certain stockholders, with the result that when actual construction started the weather had turned cold, the ground froze and free fill was not then available, all of which caused an increase in the cost of construction.

The increased construction costs are broken down as follows:

Ground fill:	At the time construction was authorized this fill was no longer available without charge and the cost thereof was—	$1301.00
Compressor and Steam Shovel:	For use in breaking up frozen ground at a cost of—	120.25
Additional Cement:	Because it is impossible to cut a fine trench in frozen ground, trench digging resulted in a larger area into which the cement was poured. The additional cost was—	1000.00
Calcium:	Was mixed with the cement by reason of the cold weather at a cost of—	170.00
Labor:	The productivity of labor was reduced by the cold weather. For example the driving of special nails into the lumber was necessary because the wood was frozen. In addition the overall output of labor in all building operations was lessened. The additional cost was—	1433.33
Fans:	Despite the many doors and entranceways in the building, it was found necessary to install 3 large roof fans for proper building ventilation. The cost was—	705.00

[fol. 43]

Toilets:	During the course of construction the prospective tenants of the new building demanded that toilets be made available to them and to their help before they would take possession. It was necessary to put in 5 toilets at a cost of—	$2000.00
		$6729.58

I may say that even though the new building has cost more than anticipated, the overall cost thereof is only $1.50 per square foot which is remarkably low in these times for a well constructed building. The Court is respectfully advised that the insurance appraisals of the replacement cost of the new building shows a value of $65,000.00 which has been the figure set by the Insurance Companies as their estimate for the value of the building in question.

Wherefore I respectfully join in the prayer of the petition that the sum of $32,641.41 be authorized for the payment of the construction costs of the building, inclusive of the sum of $26,000.00 heretofore authorized for that purpose.

Jerome Fried

Sworn to before me this 24th day of December 1955.

Chas. E. Knecht, J.P., Justice of the Peace. My Commission expires 1st Mon. in Jan. 1956.

[SEAL]

[fol. 44]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Nazareth Fair Grounds and Farmers Market, Inc., Debtor in Possession, #89669.

To all Claimants having filed claims in this proceeding:

Please take notice that on the day of January, 1956, an application by the Debtor in Possession will come on to be heard in Room at the United States Court House, Foley Square, New York City, at o'clock in the noon of that day, for the following relief:

1—Authorizing the expenditure of an additional $6,641.41 to cover the cost of the newly constructed building at the premises of the Debtor in Possession.

2—Granting leave to compromise for $8,000.00 the condemnation claim held by the Debtor in Possession against the State of Pennsylvania.

3—Granting leave to increase by $50.00 the weekly salary payable to Jerome Fried.

4—Granting leave to the Debtor in Possession to finance insurance policies over a Five year period.

All persons desiring to be heard on this application may appear at the hearing in person or by attorney. The papers on which the application is being made may be examined in the Office of the Clerk, United States Court House, Foley Square, New York City.

Alex L. Rosen, Attorney for Debtor in Possession,
225 Broadway, New York City.

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AUTHORIZING ADDITIONAL EXPENDITURES, ETC.—
January 13, 1956

At New York in said District on the 13th day of January, 1956.

Debtor in Possession having duly brought on for hearing before this Court on the 12th day of January, 1956 a motion for the following relief:

1. Authorizing additional expenditures to be made and already incurred by the Debtor in the sum of $6,641.41.

2. Granting leave to the Debtor in Possession to compromise and settle the claim against the State of Pennsylvania for condemnation of approximately one-third of an acre owned by the Debtor in Possession for the sum of $8000.00.

3. Granting leave to the Debtor in Possession to increase the salary paid to Jerome Fried for acting as Manager of the Debtor in Possession from the sum of $150.00 to the sum of $200.00 per week.

4. Granting leave to the Debtor in Possession to finance a five year payment of insurance premiums.

Now, upon reading and filing the Order to Show Cause herein made on the 28th day of December, 1955, the petition of the Debtor in Possession, verified the 27th day of December, 1955, the affidavit of Arnold A. Weinstein, sworn to the 27th day of December, 1955, the affidavit of Jerome Fried, sworn to the 24th day of December, 1955 and the affidavit of service of Anna E. Lubbe, sworn to the 30th day of December, 1955 and after hearing Benjamin Mar-

golis, Abraham Menin, of Menin & Herzog, Esqs., attorneys for claimants, Richard Hull and some of the stock-[fol. 46] holders present and after hearing Alex L. Rosen in favor of said motion, it is

Ordered that the Debtor in Possession be and it hereby is authorized to expend a total sum of $6,641.41, on account of the newly constructed building on the premises of the Debtor in Possession, and it is further

Ordered that Debtor in Possession be and it hereby is granted leave to compromise for $8,000.00 the condemnation claim held by the Debtor in Possession against the State of Pennsylvania, and it is further

Ordered that Debtor in Possession be and it hereby is granted leave to increase the salary paid to Jerome Fried, Manager of the Debtor in Possession, from the sum of $150.00 to the sum of $200.00 per week, and it is further

Ordered that Debtor in Possession be and it hereby is granted leave to finance a five year payment of insurance premiums.

Sidney Sugarman, U.S.D.J.

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REFEREE'S REPORT—November 6, 1959

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

By order dated June 19, 1959 there was referred to me for hearing and report the petition of Irving J. Wolf, holder of stock of the debtor as agent for others, for an order directing that no compensation or reimbursement of expenses be allowed or paid to Arnold A. Weinstein, H.

Lawrence Laupheimer, Jerome Fried, and Nazareth Enterprises, Inc.; that they account for and restore all compensation and reimbursement received by them; and that the debtor recoup from each of them, all such compensation and reimbursement, pursuant to section 249 of the Bankruptcy Act. The petition was withdrawn as to Laupheimer. Fried and Nazareth Enterprises, Inc. were granted the benefit of any defenses and motions asserted by Weinstein whose motion to dismiss has been heard upon due notice and is the subject of this report.

The petition alleges that Weinstein, president of the debtor, received since September, 1953 a salary of $50. a week and expenses at the rate of $15. weekly; that his sister purchased six shares of the debtor's stock in 1957; that he purchased three shares in 1958 and sold a fraction of one share; and that he and, or, persons represented by him exercised in 1959 options to purchase six shares. It [fol. 48] further alleges that Fried, general manager of the debtor, has received since September, 1953 a salary at the rate of between $100. and $200. per week, that he purchased 20 shares of stock in 1957 and sold 10 of them; and that in an affidavit verified April 29, 1958 and filed herein, he alleged that certain expenses of the debtor for labor and materials had been paid by him and, or, Nazareth Enterprises, Inc., a corporation of which he is sole stockholder, and

> that he had advanced additional unspecified sums to Robert F. Sell "for the account of the Debtor", incident to the paving of the parking lot.

Section 249 of Chapter X of the Bankruptcy Act (11 U.S.C. 649) provides that

> persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him for his account, after the commencement of such proceeding.

It forbids the allowance of compensation or reimbursement

> to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

Weinstein & Fried, in the light of the allegations touching the positions and capacity they occupy are to be deemed, for the purpose of the motion, as acting in a fiduciary capacity to the corporation. Neither is alleged to have acted as an attorney or as a fiduciary or representative of any other person or of any class. The motion to [fol. 49] dismiss presents the question whether they are seeking compensation or reimbursement within the meaning of the section upon which the petition is grounded, and ineligible to receive any.

The section deals with "persons seeking" compensation or reimbursement. It may be theorized from the quoted words that the prohibition is operative though no formal application is made, and that the salaried respondents by working each week are seeking, in effect, compensation in the form of approved salaries. It is one of a number, commencing with section 241, comprised within Article XIII entitled "Compensation and Allowances", empowering the judge to allow reimbursement for cost and expenses and reasonable compensation to designated persons and groups in the reorganization and in prior proceedings. Section 247 provides that the judge fix a time of hearing "for the consideration of applications for allowances . . . " Bankruptcy Rule X-19 directs that every "application for compensation or allowance" shall include a detailed statement of the facts required to be stated under Section 249 of the Act but, like that section, does not impose the duty upon one not making an application for compensation.

If the section relied upon were applicable to the salaried respondents all its requirements, likewise, would be. Such

result would require them to file the statements under oath each week. The conclusion is that the section's prohibition against compensation or reimbursement is operative only against those who make formal application therefor.

[fol. 50] The citations of counsel include none in point. Surface Transit, Inc. v. Saxe, 266 F.2d 862, involved "applications for compensation filed below", page 865, and denied compensation to an attorney for a committee who sold bonds of the debtor he owned at the inception of the proceedings. In re International Match Corp., 190 F.2d 458, a proceeding in bankruptcy, concerned the recovery of commissions to a referee in excess of a court imposed limitation, and directed repayment. In re Stillwell, 12 F.2d 205 involved the denial or reduction of compensation. Restoration of an allowance to a trustee's attorney procured by fraud was required in Re De Ran, 260 Fed. 732, 739.

The power of a bankruptcy court to compel repayment of moneys is not limited to those obtained by fraud but extends to those unauthorized by law or judicial approval. The petition does not suggest that the salary payments were unauthorized. Nor does it state facts showing a breach of trust. At most it challenges applications for compensation or reimbursement which have not been made. Until they are section 249 is inapplicable.

It is recommended that the petition be dismissed.

New York, November 6, 1959.

Respectfully submitted,

John E. Joyce, Referee.

To Be Placed on the Bankruptcy Motion Calendar for Hearing

November 12, 1959,

and notice thereof given by mail to:

Melvin L. Robbins, Esq., 9 East 40th Street, (sic) York, N.Y.

[fol. 51] Arnold A. Weinstein, Esq., 225 Broadway, New York, N.Y.

Mr. Jerome Fried, P.O. Box 293,
Nazareth, Pa.

Alex L. Rosen, Esq., 225 Broadway,
New York, N.Y.

Charles Seligson, Esq., 350 Fifth Avenue,
New York, N.Y.

[fol. 52] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MEMORANDUM—January 4, 1960

Sugarman, D. J.

The report of the learned Referee is disapproved.

I am of the opinion that Section 249 of the Bankruptcy Act announces a statutory prohibition against the payment of compensation pursuant to court order to salaried employees of the debtor who are fiduciaries and have traded in the debtor's stock. It is immaterial that the payments are made without formal application therefor.

The record thus far establishes that Weinstein and Fried are such salaried employees who are fiduciaries and have traded in the debtor's stock.

In so far as the petition seeks a termination of their further compensation it is granted.

[fol. 53] This leaves open only the question of recoupment. The court will take proof of the services rendered the debtor by Weinstein and Fried and of any other matters addressed to the value of their services and the equity of decreeing recoupment. This proof may be by reference to the record heretofore made in this Chapter X proceeding and any additional proof any party may wish to offer.

By January 14, 1960, the petitioner and the respondents Weinstein and Fried may each serve upon the others, the examiner, the debtor's attorney and Benjamin Margolis,

and file a schedule of such prior proof on the value of the services and equity of decreeing recoupment.

This hearing is adjourned to January 18, 1960 at 10:30 A.M., in Room 905, when any party may object to proof offered from the prior record and adduce additional proof on the said issues.

Settle an order.

Sidney Sugarman, United States District Judge.

Dated: New York, New York, January 4, 1960.

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPORT OF EXAMINER APPOINTED UNDER SECTION 168—
Filed April 22, 1960

To the Honorable Sidney Sugarman, Judge of the District Court of the United States for the Southern District of New York:

Charles Seligson, Examiner herein, pursuant to Sections 167 and 168 of the Act of Congress relating to bankruptcy, and the orders of this court, reports as follows:

Preliminary Statement

1. On September 28, 1953, Nazareth Fairgrounds & Farmers Market, Inc., the above named debtor, filed with this court a voluntary petition for reorganization under Chapter X of the said Act. Thereafter, and on the same day, such petition was duly approved and an order was entered herein continuing the debtor in possession and authorizing it to operate its business, subject to the further order of the court. At all times since the debtor has continued in possession of its property and has conducted the operation of its business.

[fol. 55] 2. The debtor was incorporated under the laws of the State of Pennsylvania on the 7th day of August

1951. The principal business of the debtor has been the operation of a "Farmers Market", at Nazareth, in Northhampton County, Pennsylvania. The principal asset of the debtor is real property consisting of land and buildings. Space is rented in these buildings by the debtor to concessionaires and merchants who sell food, clothing, housewares and miscellaneous items.

3. On or about the 5th day of January 1955, an order was made and entered herein directing the filing of proofs of stock interests, as well as proofs of claims by creditors. As a result of such order, 41 proofs of stock interest were filed. In and by the 41 proofs of stock interest claims of ownership were asserted to an aggregate of 316 shares of the capital stock of the debtor, although the debtor's Certificate of Incorporation authorizes the issue of only 200 shares. On objections filed by the debtor to the allowance of five proofs of stock interest for 54 shares, hearings were held before the Honorable John E. Joyce, Referee in Bankruptcy, and the objections were sustained. On or about the 30th day of August 1957, an order was made by Referee Joyce disallowing these five proofs of stock interest made by Benjamin Margolis, Ida Mae Margolis, Sarah Kason, Bernard Ungar, and William McK Schongut (hereinafter referred to as the "Margolis group"). A review of the said order of disallowance is pending before this court.

[fol. 56] 4. On or about the 6th day of November 1957, the debtor filed objections to the allowance of the other 36 proofs of stock interest. In addition, objections to the allowance of a number of proofs of stock interest were filed by Benjamin Margolis. The debtor also filed objections to the allowance of several proofs of claim filed by alleged creditors. Pursuant to an order of this court, the objections to the allowance of proofs of stock interest were brought on by due and appropriate notice given to the stock claimants or their attorneys by the Examiner. Hearings were thereafter held before this court on such objections and all parties in interest were given an opportunity to adduce relevant proof. These hearings extended over a period of approximately 86 days, commencing May 19, 1958 and terminating on May 7, 1959.

5. On the 3rd day of October, 1956, an order was entered by this court, pursuant to Section 168 of the Bankruptcy Act, appointing Charles Seligson as Examiner to perform the duties imposed upon a trustee under Paragraphs (1) through (5) of Section 167 of the Act.

6. During the course of the Examiner's investigation of the acts, conduct, property, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and other matters relevant to the proceeding, and in the performance of other duties under the said order of October 3, 1956 and other orders of the court, the Examiner has, at the direction of [fol. 57] the court, participated in numerous hearings. These hearings included hearings on the objections to the allowance of the proofs of stock interest at which the Examiner examined and cross-examined witnesses along with the attorneys for the debtor and for various stock claimants.

The Fundamental Issue Before This Court

7. It is impossible to formulate a fair, equitable and feasible plan of reorganization for the debtor without complete information and a resolution of the extent of the property, liabilities and financial condition of the debtor. Of paramount consideration in the formulation of any plan is determination of ownership of the capital stock of the debtor. It is extremely important for this court to decide which stock interests, if any, should be recognized as valid and subsisting and which stock interests should be rejected, in whole or in part. These determinations could result in the creation of additional claims against the debtor and could conceivably indicate causes of action available to the estate.

8. The debtor was incorporated on or about the first day of August, 1951. Commencing on or about the 17th day of October, 1951, and throughout the period of all of the transactions involved in the issuance of stock to the stock claimants herein, the debtor was dominated and controlled by one John Malakoff. Every claimant acquired his or her shares of Nazareth stock by means of transactions with or

through Malakoff or his agents. Malakoff commingled funds received by him from others for investment in Nazareth stock with his own funds and those of other cor- [fol. 58] porations controlled by him. None of the shares of stock issued to the claimants herein was sold and issued in a regular manner, that is, upon receipt of consideration passing directly to the debtor. The claimants, 36 in number, whose stock claims are the subject of this Examiner's report hold certificates aggregating 262 shares, representing an over-issue of 62 shares of stock. Furthermore, in substantially all cases the certificates were not issued to the stock claimants at or about the times when the stock claimants allegedly gave consideration to Malakoff for the issuance and delivery of such shares.

9. Each of the claimants, cognizant of the foregoing state of facts, seems to recognize the invalidity of his or her stock claim under strict rules of corporate law and practice. Each claimant bases his or her claim to a stock interest in the debtor upon equitable principles. Each relies upon the "broad equity power" vested in this reorganization court, "to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper* v. *Litton*, 308 U.S. 295, 304.

The Conflicting Claims

The Position of the Debtor.

10. The debtor has objected to the allowance of all 36 claims of stock interest. The debtor's objections are based generally on the following propositions: (1) that no consideration passed from any stock claimant directly to the [fol. 59] debtor and (2) that Malakoff was not entitled to the stock that was issued to each stock claimant. If the debtor's objections are upheld and all 36 stock claims are held invalid, the debtor will be without stockholders. The memorandum of law submitted by Alex Rosen, Esq., attorney for the debtor, does not ask that this extreme result be reached. The debtor's position as set forth in the memorandum submitted in its behalf is as follows:

(1) Malakoff did not purchase any interest in Nazareth for his own account but for the account of those who invested in Nazareth through him.

(2) An interest in Nazareth may be predicated only on the basis of a present consideration given to Malakoff for the express purpose of purchasing a Nazareth interest.

(3) The persons whose moneys were paid specifically for an investment in Nazareth are the beneficial owners of Nazareth and as to them Malakoff was a fiduciary.

(4) Malakoff, as a fiduciary, had no right to deplete the interests of bona fide investors by:

(a) The transfer of interests in Nazareth to satisfy or secure his personal obligations.

(b) The transfer of Nazareth stock for interests in real estate or for stock in other corporations which were transferred to him personally.

(c) The issuance of the debtor's paper or the diversion of its funds in payment of his personal obligations.

[fol. 60] (5) The distribution of the capital stock of Nazareth should be determined solely on equitable principles, so that any person (a) who participated in the machinations of Malakoff, or (b) who as an officer or director permitted Malakoff to divert the stock and assets of Nazareth, or (c) who was guilty of fraud, or (d) whose consideration consisted of usurious balances, or (e) who had knowledge of fraud or irregularities in the Nazareth promotion or management, or (f) whose hands are unclean on the basis of equitable considerations should not be permitted to share in the capital stock of Nazareth.

(6) On equitable principles, the time of payment to Malakoff for an interest in Nazareth, the time when Malakoff acquired any interest in Nazareth, the time of the issuance and receipt of stock certificates, and the fact of an overissue are not the crucial issues here involved.

(7) Each stock claimant is entitled to share in the Nazareth capital stock in proportion to the actual present consideration paid for the specific purpose of investing in Nazareth, less any return of capital. This is on the theory that the debtor's stock, as representative of the rest of the venture, is chargeable with a constructive trust for the benefit of those persons whose money was given specifically for investment in Nazareth.

11. Thus the debtor divides the claimants into two classes, subject to the provisos specified in Paragraph 9(5): [fol. 61] (a) those persons who paid a present consideration to Malakoff for the specific purpose of investing in the business and property of the debtor; and (b) those who received the debtor's stock in satisfaction of, or as security for, Malakoff's personal obligations.

12. The debtor's position is that the shares claimed by persons of the first class should be deemed valid and that those held by persons of the second class should be deemed invalid.

The Position of Davidson.

13. Robert R. Davidson and Irving J. Wolf (referred to in this report as "Davidson"), the assignees of the 102 shares described in the proofs of stock interest filed by Richard S. Hull (6 shares), Dorothy Kane (3 shares), Charles Kanter (40 shares), Frederick Katzenell (35 shares), Ernest Pollak (9 shares), Ann Rosen (6 shares), and Leslie Saul (3 shares) urge a different basis for this Court's determination of which shares are valid. As stated in their memorandum of law, interposed by their attorney, Melvin L. Robbins, Esq., the said assignees deem the time of payment for the shares to be dispositive in the determination of their validity. Davidson asks that the claimants be divided into four classes:

(1) investors prior to August 7, 1951, the date of incorporation of the debtor;

(2) investors after August 7, 1951 and prior to October 17, 1951, when John Malakoff acquired legal title to the first 20 shares of the debtor's stock (then the entire outstanding issue);

[fol. 62] (3) investors after October 17, 1951 and prior to February 2, 1953, the earliest date of issuance and delivery of any of the certificates of stock now held by claimants; and

(4) investors after February 2, 1953.

Davidson urges that the claims of those in the first three categories be allowed and that there be allowed only those of the fourth class who made contemporaneous advances to John Malakoff, and concurrently received stock certificates, regular on their face.

If the position of either the debtor or Davidson is adopted by this court, the total number of shares will be less than 200, and there will be no problem of overissuance. Both the debtor and Davidson do, however, urge that all overissued shares, that is, all shares issued after the first 200, are absolutely void.

The Position of other Stock Claimants.

14. At the hearings before this court, several other claimants appeared and testified in support of their own individual claims, without taking a position with respect to other claims or any overall position or theory concerning all of the stock of the debtor.

Arnold Weinstein appeared *pro se* and took the position that he should be deemed the owner of that proportion of the debtor's stock which $7,000, the amount of his investment, bears to the total amount paid by all *bona fide* investors, regardless of any "overissuance".

[fol. 63] Claimant Robert A. Noire, claiming five shares, appeared by his attorney, Nicholas Kohn, Esq., and testified in his own behalf. His position is the same as that of Arnold A. Weinstein.

Seymour Forman appeared by Louis R. Patur, Esq., and testified in his own behalf. He claims a participation as a stockholder to the extent of $10,000 on the same basis as the claims of Noire and Weinstein; he also claims to be a creditor in the amount of $5,000, or, if such claim is disallowed, participation as a stockholder to the extent of $15,000 worth of stock.

Herbert and Melvin Danciger and Gertrude Klein were represented by Leonard Franklin, Esq. The Dancigers claim to have become the owners of 11 shares of stock of the debtor, by applying said shares, held by them as collateral, toward satisfaction of antecedent indebtedness of John Malakoff to them. Gertrude Klein holds 14 shares and claims to have paid $14,000. Of the $14,000, she alleges that she paid $6,000 by application of that sum from her share of the proceeds of the sale of certain property in Philadelphia, held for her by John Malakoff.

The Facts Developed at the Hearings

The Organization of the Debtor and Acquisition of its Property.

15. The debtor is a corporation organized under the laws of the Commonwealth of Pennsylvania. It was formally incorporated on August 7, 1951. Its principal tangible assets consist of realty (land and buildings) located on a parcel of approximately 32 acres, situated at [fol. 64] the junction of Routes 12 and 45, Lower Nazareth Township, Northhampton County, Pennsylvania. The debtor, as landlord, actively operates its business on the premises.

16. On October 11, 1945 James A. Harter purchased the business and realty which later became that of the debtor. On the same day Harter mortgaged the realty to Rachel A. Metzger and Mildred E. Erickson, to secure payment of the principal sum of $8500. On January 11, 1949, Harter conveyed the realty and business to Nazareth Fairgrounds, Inc., a Pennsylvania corporation, all of the stock of which was owned by Harter and Laurena C. Shope. On the same day, Nazareth Fairgrounds, Inc. mortgaged the realty to Alice Kline, to secure payment of the principal sum of $14,500.

17. On March 13, 1951, a contract was executed by and between Nazareth Fairgrounds, Inc., seller, and Richard Realty Co., purchaser, for the sale of the business and realty, subject to certain existing and prospective mortgages, for the aggregate price of $66,000. On April 17,

1951, the transaction was consummated by the sale and conveyance of the business and realty to Richard Realty Co., in which John Malakoff had a one-fourth interest. The realty was conveyed subject to a first mortgage held by Metzger and Erickson in the amount of $8,500, the Kline mortgage, and a purchase money third mortgage to Harter and Shope in the amount of $10,000.

[fol. 65] 18. On April 20, 1951, the Kline mortgage was satisfied. Still outstanding were the Metzger and Erickson mortgage and the Harter and Shope purchase money mortgage.

19. On May 14, 1951, Richard Realty Co. sold the business and realty to Kipling Realty Co. for $100. The realty was sold subject to the two mortgages, the Metzger and Erickson and the Harter and Shope mortgages. Both Richard Realty Co. and Kipling Realty Co. were Pennsylvania corporations, all of the stock of which was registered in the name of Murray Realty Co., a Pennsylvania partnership of whom Edward Malakoff and Maurice Malakoff were the general partners. These corporations were used solely as dummy corporations for the purpose of transferring and taking title to property in various real estate transactions. Edward Malakoff's associates included his father, Maurice Malakoff, his brother-in-law, Milton R. Zoloth, two employees of Murray Realty Co., Paul Laury and Anna Spivak, and Morris Soble and Max Levy.

20. In July 1951, John Malakoff orally agreed to purchase the Nazareth real estate for the same price paid by the Richard and Kipling Realty Companies, to wit, approximately $66,000, plus an unresolved amount. The Philadelphia group had opened its books on the Nazareth joint venture, as of April 17, 1951, and these books reflected an original capital investment of $40,000 coming from Soble and $12,489 coming from John Malakoff. Within a week or ten days after the oral agreement, possession of the market was delivered to John Malakoff and he put his own manager in charge.

[fol. 66] 21. Despite the oral agreement to purchase the Nazareth real estate made by John Malakoff with Edward

Malakoff, or perhaps pursuant thereto, arrangements were made for the organization of a corporation to take over the Nazareth property and business. In anticipation thereof, the capital investment of $40,000 of Soble was adjusted so as to show a loan due Soble in the sum of $38,500 and a capital investment by him of $1,500.

22. On August 1, 1951 the articles of incorporation of Nazareth Fair Grounds & Farmers' Market, Inc. were executed by Zoloth, Laury and Spivak, who were incorporators, subscribers and initial directors. They subscribed to one share each. The office of the corporation was designated as Room 603, 1616 Walnut Street, Philadelphia, Pennsylvania, which was the office of Murray Realty Co.

23. The articles of incorporation of the debtor corporation provide, among other things:

> The authorized capital stock of the corporation is divided into two hundred shares of common stock without par value. The stated capital applicable thereto is $120,000.
>
> The value of the property with which the corporation will begin business is $1,500.

24. According to the debtor's minute book, the first meeting of shareholders was held at its office in Philadelphia on August 8, 1951. Present were Zoloth, Laury [fol. 67] and Spivak and the incorporators and subscribers. On August 9, 1951 the first meeting of directors was held at the company's office. Present were the directors named in the articles of incorporation, Zoloth, Laury and Spivak. The principal business transacted at the August 9th directors' meeting is summarized in a resolution reading, in part:

> That this Board accept the offer of Milton R. Zoloth and Morris Soble and purchase from them the business and property consisting of thirty-two acres of ground situated on the southwest corner of the intersection of Pennsylvania Routes Nos. 12 and 45 in Lower Nazareth Township, Pennsylvania, together with all of the assets of the said business, as set forth in a

copy of a balance sheet submitted by the said Milton R. Zoloth and Morris Soble, dated August 8, 1951, as follows:

(The balance sheet is summarized below)

Further Resolved, that this corporation assumes the payment of all of the obligations of the partnership as set forth above and that the President and Secretary of this corporation are authorized and directed to issue and deliver in accordance with the terms of the said offer, certificates for twenty full paid and non-assessable shares of this corporation to the said Milton R. Zoloth and Morris Soble.

25. The balance sheet referred to in the resolution shows assets consisting of realty valued at $66,456.50, improvements thereto of $9,794.64, less depreciation reserve of $1,023.75. Liabilities included a first mortgage (Metzger and Erickson) of $8,500 and a second mortgage of $9,500 (Harter and Shope), loans payable (without designation) of $57,135.92 and net worth of $1,500. The balance sheet also reflects a recapitalization reducing Soble's capital investment to $1,500, with the balance shown as a loan payable. The offer referred to in the resolution was made by Zoloth and Soble with Zoloth acting on behalf of the Murray [fol. 68] Realty Co. which owned all of the stock of the Kipling Realty Co. and with Soble representing his own interest.

26. On September 26, 1951 Kipling Realty Co. formally sold the business and realty to the debtor. The real property was sold subject to the mortgages aggregating $18,000 and the sales price was $100.

John Malakoff's Acquisition of the Stock of the Debtor.

27. On or about the 8th day of August 1951, Stock Certificate No. 1 for 10 shares of the Nazareth stock was issued to Milton R. Zoloth and Stock Certificate No. 2 for 10 shares of Nazareth stock was issued to Morris Soble. These cer-

tificates were signed for Nazareth by Milton R. Zoloth, President, and Paul Laury, Secretary, and the corporate seal was affixed to each certificate. Stubs for certificates numbered 1 and 2 have affixed thereto United States documentary stamps.

28. On October 17, 1951 a contract was executed between Zoloth and Soble, as sellers, and John Malakoff, as purchaser, whereby the entire outstanding issue of Nazareth stock (then 20 shares) was sold for the aggregate price of $32,853.08, ostensibly payable by deposit of $2,853.08 upon execution of contract, the balance of $30,000 due in ten equal monthly installments of $3,000 each, the first installment due November 17, 1951, and monthly thereafter until payment of the final installment on October 17, 1952.

29. The contract provided that title to the stock would pass to the purchaser immediately upon payment of the deposit of $2,853.08, receipt of which was acknowledged. The contract further provided that:

[fol. 69] 1. All the stock was to be held in escrow by Edward Malakoff (effectually as pledge-holder for the sellers) until full payment of the balance of $30,000;

2. John Malakoff was entitled to dividends on the stock;

3. Zoloth and Soble expressly retained voting rights on the stock until full payment by John Malakoff; and

4. In the event of John Malakoff's default in meeting any installment payments, all moneys received by Zoloth and Soble on account, were to be retained as liquidated damages by them, and title to the stock was thereupon to revert to Zoloth and Soble.

30. On October 17, 1951, Zoloth endorsed his Certificate No. 1 for 10 shares of the Nazareth stock over to John Malakoff and on October 22, 1951, Soble did likewise with respect to his Certificate No. 2. United States documentary stamps and Pennsylvania stock transfer tax stamps were affixed to each certificate in connection with the transfer thereof

to Malakoff. The certificates, however, were not actually delivered to John Malakoff until December 1952. At that time the corporate minute book and the books of account were also delivered to him.

31. In October 1951, after the Zoloth and Soble stock had been endorsed over to Malakoff, the records indicated that the sum of $57,135.92 was owed by Nazareth to Malakoff and in turn by him to the Philadelphia group. It also appeared that John Malakoff had obligated himself to pay the Philadelphia group the sum of $32,853.08 for 20 shares of Nazareth stock of the book value of $1,500.

[fol. 70] 32. There is a conflict in the evidence as to whether Malakoff assumed corporate control over Nazareth in October 1951 or thereafter and in 1952. Minutes back-dated to October 17, 1951 reflect a meeting of the Nazareth directors at which the old directors and officers resigned and Malakoff, Jerome Fried and Richard S. Hull were elected the new directors and Malakoff and Fried were elected officers. On the other hand, the evidence discloses that on several occasions in 1952, the officers of Nazareth were certified as Zoloth and Laury. Despite this conflict, it is clear that Malakoff had taken over control of the operation of the market before October 1951.

33. It will be recalled that in April 1951, Malakoff became a member of the joint venture which acquired the Nazareth business and realty. He acquired a one-fourth interest, represented by an advance or credit in the sum of $12,489, on or before April 17, 1951. Malakoff obtained the moneys for this advance or credit from others, including the $4,000 from Charles Kanter, $2,000 from G. Silver and $2,000 from M. Samet.

34. As of May 8, 1951, Malakoff had advanced the sum of $17,489 to the Philadelphia group. On that date these advances were converted on the books of the Philadelphia group from a one-fourth share by Malakoff in the joint venture to a credit to Malakoff against the debt to be created by him in favor of the Philadelphia group for acquisition of the Nazareth assets at a price to be agreed upon thereafter. Subsequently Malakoff made additional advances to

the Philadelphia group. Between April 1, 1951 and Febru-
[fol. 71] ary, 15, 1952, the Philadelphia group received a total of $49,489 from Malakoff in connection with the transfer and conveyance of the market from the Philadelphia group to Nazareth and Malakoff.

35. The Philadelphia group also received the sum of $11,032.84 representing the net proceeds of a windstorm loss to Nazareth in September and October 1952. This payment to the Philadelphia group was charged on the Nazareth books to Malakoff's loan account.

36. The total received by the Philadelphia group from Nazareth and Malakoff is $60,521.84. The amount that group was entitled to receive from Nazareth and Malakoff was $89,989. There is a balance of $29,467.16 due to the Philadelphia group under contracts with Nazareth and Malakoff. That group has not filed any proof of claim in this proceeding, and Edward Malakoff stated in court that the group did not intend to assert the indebtedness against the debtor.

37. On June 17, 1953, Malakoff's loan account with Nazareth reflected a credit to him of $68,442.92. This represented, among other items, the sum of $57,135.92 carried over from the joint venture upon incorporation plus two items, one of $9,507 and the other of $350. On June 17, 1953, Malakoff executed a formal release of any and all claims against Nazareth. On the same date, Malakoff assigned to Nazareth by endorsement thereof Stock Certificates No. 1 and 2, aggregating 20 shares, which had previously been endorsed over to him by Zoloth and Soble.

38. On June 17, 1953, Malakoff was insolvent and all of his creditors knew or had reasonable cause to believe that he was insolvent.

[fol. 72] *John Malakoff's Sales of Participations in the Nazareth Market and Stock of the Debtor.*

39. Claim No. 27 for 40 shares of Nazareth stock was filed by *Charles Kanter*. This claim is based upon Certificate No. 4 for 12 shares dated February 2, 1953, Cer-

tificate No. 71 for 8 shares bearing the same date and Certificate No. 72 for 20 shares dated April 17, 1953. According to the proof of claim, Certificate No. 4 was purchased on April 4, 1951, Certificate No. 71 on October 15, 1951 and Certificate No. 72 on April 17, 1953. The proof does not include a power of attorney but the back to which the proof is attached discloses that Maurice Harbater, Esq. is the attorney for claimant.

Objections to the allowance of Kanter's stock claim No. 27 were filed by the debtof and by Ida Mae Margolis, et al. The debtor's objections were grounded upon the contentions that Malakoff did not own the stock certificates which were delivered to claimant by Malakoff and that no consideration passed to Nazareth in exchange for the certificates issued to Kanter. The Margolis objections alleged that Stock Certificate No. 72 for 20 shares represented shares sold in excess of the authorized issue of stock of the debtor and were therefore void under Pennsylvania law; that there was no consideration for the issuance of the said stock certificate and that Kanter did not become a purchaser for value; that Kanter should have paid $20,000 for the 20 shares and at best paid only $12,000; and that [fol. 73] as a result of a conspiracy no objection was filed by the debtor to the allowance of the said 20 shares of stock. The Margolis group also objected to the allowance of Kanter's claim for 20 shares of stock represented by Certificates No. 4 and 71 on the ground that Malakoff had no shares to sell or transfer. Notice of a hearing on the said objections was given by the examiner to the claimant, Maurice Harbater, Esq. and other parties in interest.

Kanter first met Malakoff early in 1951. He was present in Malakoff's office when Ed Malakoff proposed to John Malakoff that he take a one-quarter interest in the market for $16,000. Kanter decided that he would invest $4,000 for a one-fourth interest in the one-fourth interest to be acquired by John Malakoff and he did this on or about April 10, 1951. He gave John Malakoff a check for $2,667 and $1,333 in cash or customers' checks. As evidence of his investment, Kanter received from John Malakoff, shortly after he made his advance, a promissory note of John Malakoff, Agent, for $4,000 payable to the order of Charles

Kanter on demand and dated April 11, 1951. Endorsed on this note is the legend "For 1/16 of interest in Nazareth Market".

Kanter's testimony is confusing as to when he was approached by Malakoff with respect to the purchase of additional shares. He first testified that about four months after his original purchase, Malakoff told him that he had acquired the other three-quarters of the market and that he was selling shares at $1,000 per share but to those who had [fol. 74] previously invested the shares would be $600 each. Later Kanter testified that about one month after the original purchase Malakoff told him that he was buying the rest of the market and intended to issue 200 shares selling at $1,0000 per share. According to Kanter, Malakoff told him that he was entitled to 12 1/2 shares since he had a one-sixteenth share of the market. Kanter claims to have purchased 8 additional shares for $600 each or a total of $4800 but the record is far from clear as to when and in what form the consideration passed to Malakoff, if at all.

Kanter had numerous transactions with Malakoff and it is impossible, except in a few instances, to identify checks from Kanter to Malakoff with particular transactions. It is significant that in answering a questionnaire on February 26, 1954, Kanter stated that he paid $4,000 for 10 shares in April 1951, $6,000 for 10 shares in November 1951, and on April 17, 1953 paid $12,000 for 20 shares.

Kanter did not produce a receipt for either the original $4,000 he claims to have paid to Malakoff in April 1951 or the $4800 he contends he gave Malakoff thereafter for 8 additional shares. He did submit the promissory note of John Malakoff, Agent, for $4,000 dated April 11, 1951 and a letter from John Malakoff to him dated January 15, 1952. This letter acknowledges receipt of a check (the amount not being stated), and recites that during the course of Malakoff's management of the market, he may cause the issuance to Kanter of 20 shares of his "present stockholdings". [fol. 75] Kanter did produce 2 checks, one for $2,500 dated May 10, 1951 payable to John Malakoff and the other for $500 dated June 6, 1951 payable to John Malakoff and he testified that these checks were originally given to Malakoff for investment in the Wales Hotel. He further testified

that at Malakoff's suggestion this $3,000 and cash or other moneys borrowed by Malakoff from Kanter from time to time were used to purchase 8 shares in Nazareth at $600 per share. Later in his testimony Kanter stated that he no longer remembered what the $500 check dated June 6, 1951 represented.

Malakoff's ledger supports Kanter's testimony of the advance of the original $4,000. The fact that additional moneys were advanced by Kanter to Malakoff in relation to Nazareth is also confirmed by so-called dividend checks issued by Malakoff to Kanter. Kanter produced a check for $2,700 dated January 22, 1952 payable to Charles Kanter and endorsed "Chas. Kanter" and "John Malakoff Agt." Over the endorsement of Kanter appears the words "Nazareth Market" but it is doubtful that these words were written before the check was endorsed by Kanter. In any event, Kanter testified that this check represented a loan to Malakoff to help the finances of the market and had nothing to do with Kanter's acquiring any stock in the market.

On September 1 and October 1, 1951, Kanter received checks of John Malakoff Agent for $100 each drawn upon the Corn Exchange Bank Trust Company. The word "Nazareth" appears over the endorsement of Charles Kanter [fol. 76] on each of these checks and it seems certain that these checks represented so-called dividends. Dividends of $100 monthly represent a return of 20% upon an investment of $6,000. Based upon Malakoff's practices it is reasonable to assume that as of September 1, 1951, Malakoff had received a total of $6,000 from Kanter for investment in Nazareth.

Between November 1, 1951 and April 1, 1953 inclusive, Kanter received on or about the first day of each month checks of John Malakoff, Agent or John Malakoff, Special or John Malakoff for $200 each except during the months of February and March 1953. All of these checks except the check dated April 1, 1953 (drawn upon the Manufacturers Trust Company) were drawn upon the Corn Exchange Bank Trust Company. Only one of these checks, that dated October 1, 1952, is identified with Nazareth but the testimony could support the conclusion that they represented so-called dividend payments upon an investment of $12,000 by Kanter

with Malakoff. It might be contended that these so-called dividend payments were given to Kanter upon an investment in one of Malakoff's other ventures and not Nazareth, except for the fact that the Siegel, Berg Co. report of June 30, 1953 on Nazareth discloses that Kanter received a $200 dividend check in February 1953 and another $200 dividend check in March 1953.

The stub for Certificate No. 4 for 12 shares discloses that the word "option" was originally written thereon and then crossed out. The stub for Certificate No. 71 bears the legend "no dividends" written in longhand in two places, the word "additional", and the word "void" crossed out. The stub for Certificate No. 72 discloses that it was originally [fol. 77] issued for 20 shares, then for 12 and thereafter for 20. It also has the following comments: "See agreement Ambassador Hotel"; "dividends on 12 shares"; "12,000.00 see JM" and "can buy back within 3 years 12000". In addition, the stub for this certificate originally had written out in longhand the word "option", which is crossed out.

Kanter produced an agreement dated April 17, 1953 between him and Malakoff which was marked in evidence. Under this agreement Kanter transferred to Malakoff any and all interest he had in Ambassador Estates, Inc. and the Hotel Margaret in Brooklyn, New York, and he released Ambassador Estates, Inc. from any and all claims. Malakoff agreed to cause to be issued to Kanter 20 shares of Nazareth stock. The agreement further provided that the stock should be endorsed to the effect that it was subject to the terms of the agreement. Malakoff was given an option to purchase part or all of the 20 shares of Nazareth stock at the rate of $600 per share. Malakoff also agreed to pay Kanter $2,000 at the rate of $50 weekly, and to make other payments against the $2,000 in the event the leasehold of the Margaret Hotel was sold by Ambassador Estates, Inc.

It thus appears that Kanter shifted an investment of $12,000 in Ambassador Estates, Inc. to Nazareth, and received 20 shares of Nazareth stock for that investment. Nothing was paid by Kanter to Nazareth at the time the said agreement was made and Certificate No. 72 was issued

to Kanter, and it does not appear that Nazareth was indebted to Kanter in any amount at that time.

[fol. 78] Kanter's position is that as to his first 12 shares he was a pre-incorporation subscriber and is therefore entitled to retain these 12 shares without regard to the consideration paid to Malakoff therefor. In regard to Certificate No. 72 for 20 shares, Kanter concedes that he is not entitled to the allowance of these 20 shares if the stock of four other claimant stockholders in his Class 4 are disallowed; otherwise he claims he is entitled to the allowance of such 20 shares. Concededly, Kanter made no contemporaneous advance to Malakoff when Stock Certificate No. 72 was delivered to him.

The debtor's position is that Kanter has not established having paid any consideration for his acquisition of any interest in Nazareth; and that he was engaged in usurious transactions with Malakoff and for these and other reasons Kanter's stock should be disallowed. The debtor also takes the position that it is entitled to "affirmative judgment for all damages caused to the debtor (or indirectly to the stockholders of the debtor the Court finds are legally such) for the monies realized by JM for the sale of the Debtor's stock over the amount paid for the acquisition of Nazareth".

The debtor has failed to establish any participation by Kanter in the so-called machinations of Malakoff. There is no evidence to support a finding that Kanter permitted Malakoff to divert the assets of Nazareth or findings that Kanter is guilty of fraud or had knowledge of fraud or irregularities in the Nazareth management. The evidence [fol. 79] is far from establishing that the consideration paid by Kanter to Malakoff consisted of usurious balances or that Kanter's hands are unclean.

Assuming that Malakoff controlled the issuance of the Nazareth stock, it would seem to make no difference whether he caused stock to be issued for a present cash consideration or an antecedent indebtedness. It should be noted that under the Uniform Fraudulent Conveyance Act consideration is fair when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied.

On the basis of the so-called dividend checks it would appear that Kanter invested $12,000 in Nazareth through Malakoff. On the other hand, according to Kanter's own testimony, he invested only $4,000 for the first 12 shares of Nazareth stock that were issued to him and $4800 for the additional 8 shares. His total investment was therefore $8,800, apart from his investment in Ambassador Estates, Inc. Kanter received in dividends on his Nazareth investment a total of $3800. His net investment in Nazareth is $5,000. Kanter, however, is entitled to a credit of $12,000 for his investment of that amount in Ambassador Estates, Inc. which was transferred to Nazareth under the agreement of April 17, 1953. His total investment in Nazareth is therefore $17,000.

Accordingly, the sum of $17,000 constitutes the net fair value of Kanter's investment in Nazareth.

[fol. 80] 40. Claim No. 14 for 2 shares of Nazareth stock was filed by *Morton Samet*. Subsequently, and on or about the 11th day of March 1955, Samet filed an amended proof of claim No. 23, for 2 shares of Nazareth stock. This stock was represented by Stock Certificate No. 5, dated February 2, 1953, in the name of Morton Samet. Power of attorney was given to Herman R. Agins, Esq., 285 Madison Avenue, New York 17, New York. The amended claim apparently covered the same stock embraced by the original claim and specifically states that the consideration for the 2 shares of stock was the sum of $2,000 evidenced by checks, dated March 14, 1951 and April 10, 1951, in the amounts of $1500 and $500 respectively, both payable to the order of John Malakoff.

The debtor objected to the allowance of Samet's stock claim No. 14. These objections were grounded upon the contentions that Malakoff did not own the stock certificate which was delivered to claimant and that no consideration passed to the debtor in exchange for the certificate of stock issued to Samet. Notice of a hearing on the debtor's objections was given to Samet by the Examiner. Samet appeared at the hearing on the objection to the allowance of his stock claim, and made no point of the fact that the objections were directed to the original claim No. 14 rather than to the

amended claim No. 23. Moreover, Samet did not object to the notice of hearing on the ground that no notice had been given to his attorney in fact. All of the parties treated the objections as though they had been made to the allowance of Samet's claim No. 23.

[fol. 81] Early in 1951, Malakoff recommended or suggested to Morton Samet that he invest in a proposition involving Nazareth from which, he promised, Samet would get a very good return. Samet contends that in March and April 1951, he gave Malakoff a total of $2,000 for investment in Nazareth. In support of this contention, he has produced a check for $1500, dated March 14, 1951, signed by him, payable to the order of Malakoff and drawn upon the Freeport Bank of Freeport, New York, and another check for $500 dated April 10, 1951 made by him to Malakoff and drawn upon the same bank. Both checks were endorsed "John Malakoff" and "John Malakoff, Agent" and were deposited in Malakoff's Agent account in the Corn Exchange Bank Trust Company of New York. Samet did not get a receipt from Malakoff at the time but asked for one a month or so thereafter. He did not get a receipt then but in June of 1952 he received a handwritten letter from Malakoff, dated June 12, 1952, reciting that he had invested "in the sum of two thousand Dollars ($2000) which is a part share (1/32) in a deal, which is known as "Nazareth Market". This letter stated that the purchase price was $85,000 and mortgages $18,000 and that "Now, all you have to do is to take profits."

Samet had a number of other transactions with Malakoff after the Nazareth deal. Although he was unable to produce any checks covering transactions before 1951, Samet thinks that he had a lot of dealings with Malakoff in that period. From the inception of his transactions with Mala-
[fol. 82] koff, Samet approximates that the total amount given to Malakoff was $11,000. The amount collected from Malakoff, according to him, was $7,000 with the difference of approximately $4,000 represented by his investment in Nazareth.

Samet received only one stock certificate from Malakoff. This is Certificate No. 5, dated February 2, 1953, for two shares in the name of Morton Samet. The stock book stub

for Certificate No. 5 has the words "out" and "Hotel Margaret" written in longhand thereon, and no satisfactory testimony was adduced to explain the reason for the appearance of either of these two words on the stub. The stock certificate received by Samet was lost, and he testified that he did not sell, transfer or assign any of his interest in the stock certificate or any stock of Nazareth.

Eighteen checks for $33.34 each of "John Malakoff", "John Malakoff, Agent," or "John Malakoff, Special," payable to the order of Morty Sameth or M. Samet were received in evidence. These checks are dated on the 1st or 2nd day of each and every month, commencing with September 1, 1951 and continuing through May 1, 1953, except that there are no checks for October 1952 and February and March 1953. The testimony discloses that these checks represented so-called dividend payments to Samet on his investment in Nazareth.

Samet also received a check of "John Malakoff, Special," for $83.84, dated October 1, 1952, and drawn upon the Corn Exchange Bank Trust Company. This check has the word "Nazareth" written over the endorsement of M. Samet and apparently represents the so-called dividend of $33.34 for October 1952 and a $50 payment made to Samet by Malakoff [fol. 83] with respect to a separate transaction. A financial report of Siegel, Berg & Company on Nazareth, as of June 30, 1953, discloses that Samet received a check for $33.34, dated February 1, 1953, and a check for the same amount, dated March 2, 1953, of Nazareth drawn upon the Second National Bank of Nazareth, Pennsylvania. These checks undoubtedly represented so-called dividends for the months of February and March 1953. Thus Samet received a total of $700.14 on his investment in Nazareth. Since no dividends were actually paid or earned, these payments should be regarded as a return of capital by Malakoff to Samet. Further, the fact that Malakoff paid these so-called dividends to Samet on the basis of an investment of only $2,000 negatives Samet's testimony that approximately $4,000 was invested by him in Nazareth. Malakoff's ledger confirms that he acquired a one-fourth interest in Nazareth in the Spring of 1951 and, in connection therewith, received $2,000 from Samet.

The longhand writings on stub No. 5 of the Stock Certificate Book would seem to indicate that the stock certificate was issued to Samet in connection with a transaction involving Hotel Margaret. These writings also suggest the possibility that Stock Certificate No. 5 may have been returned to Malakoff by Samet or was destroyed pursuant to an agreement under which any debt from Malakoff to Samet in respect of Nazareth was cancelled. On the other hand, since Samet received the so-called dividend payments through April 1, 1953, it is unlikely that such an agreement was made.

[fol. 84] On all the evidence, it is clear that the maximum invested by Samet in Nazareth was $2,000. It is equally clear that the maximum credit to which he is entitled for his investment in Nazareth through Malakoff is $1,299.86, which represents the difference between his maximum investment and the so-called dividends received by him. The said sum of $1,299.86 constitutes the net fair value of Samet's investment in Nazareth.

41. Claim No. 35 was filed by *Gertrude Klein.* This claim is for $14,000 and states that the consideration was payment of that amount to John Malakoff, President of Nazareth, for the purchase of 14 shares of Nazareth stock. The claim also states that the purchase was made in six transactions on April 2, 1951, September 20, 1951, October 16, 1951, January 21, 1952, October 23, 1952 and November 15, 1952, for which Stock Certificate No. 6 in the amount of 14 shares was issued to claimant on February 2, 1953.

Objections to the allowance of Claim No. 35 were filed by the debtor on the usual grounds, to wit, that Malakoff did not own the stock that was delivered to claimant and that no consideration passed from claimant to Nazareth. In addition, the debtor alleged that all or a portion of the purported payments for the purported purchase of stock was based on past due indebtedness or on past transactions that claimant had with Malakoff personally. Claimant is referred to as Gertrude Silver Klein. Notice of a hearing on said objections was given by the Examiner to the claimant and the debtor.

[fol. 85] Claimant Gertrude Klein testified that she had known Malakoff practically all her life. She had financial transactions with Malakoff prior to the time she discussed Nazareth with him. She first talked to Malakoff about the Nazareth market prior to April 1951. She gave Malakoff a check for $2,000 dated April 2, 1951 representing an investment of that amount in Nazareth. This check, which she produced, is payable to John Malakoff, is endorsed John Malakoff and John Malakoff, Agent, and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. When she gave this check to Malakoff, Mrs. Klein was told that she would be getting 20% interest on her investment and that Malakoff was going to issue stock to cover the investment. Mrs. Klein did not get a receipt from Malakoff for her $2,000 investment.

Thereafter, and on or about September 20, 1951, Mrs. Klein made a further investment of $1,200 in Nazareth. This investment was evidenced by a check payable to John Malakoff dated September 20, 1951 endorsed John Malakoff and John Malakoff, Agent. This check was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Over the endorsement appears the word "Nazareth". Mrs. Klein did not get a receipt from Malakoff covering this $1,200 investment.

Mrs. Klein claims that she made a further investment in Nazareth of $2,300 on or about January 21, 1952 by a check bearing that date payable to John Malakoff. This check is endorsed John Malakoff and John Malakoff, Agent. It is not clear from the endorsement in what account this check was deposited. When Mrs. Klein gave this check to Malakoff, she was told that she would get 20% interest [fol. 86] and that Malakoff intended to issue stock which would eventually be sent to her. Mrs. Klein testified that some time between January and February of 1952, she gave Malakoff $500 in cash in one lump sum and that she obtained this cash by cashing a bond.

According to Mrs. Klein, on April 10, 1952 she gave Malakoff a check for $2,000 as a loan and several months later Malakoff told her that he would credit the $2,000 to Nazareth, thus bringing her investment in Nazareth up to $8,000. To substantiate this testimony, Mrs. Klein produced

photostatic copy of a check dated April 10, 1952 for $2,000. This check was endorsed John Malakoff and John Malakoff, Agent. It also appears that Mrs. Klein made an investment of $5,500 with Malakoff in connection with certain property in Philadelphia known as the Locust Properties Inc. She claims that as a result of this investment she was entitled to get back a total of $6,000 and that she told Malakoff she wanted that money invested in Nazareth. She was given six shares of Nazareth stock by Malakoff in consideration of $6,000. Mrs. Klein produced papers which confirm her investment in Locust Properties Inc. and the fact that she should have received a return of at least $6,000 therefrom.

The only receipt that Mrs. Klein seems to have obtained from Malakoff is a letter dated November 15, 1952 addressed to Gertrude Silver Klein and signed John Malakoff. This letter acknowledges the receipt "of your monies of $14,000.00 in the matter of the Nazareth Farmers & Auction Market at Nazareth, Pennsylvania." In the typed [fol. 87] portion of the letter it is stated that all of the authorized stock of the Nazareth Farmers & Auction Market Inc. "which owns the Market" has been issued "to me (Malakoff)". The typed portion states that dividends of 20% per annum have been declared and that a dividend at that rate will be paid on the first day of each month. It also states that he (Malakoff) may cause the dissolution of the corporation and arrange for the formation of a limited partnership, in which Mrs. Klein would be a limited partner, and her "14/200 will be applied as contribution with a corresponding proportionate interest". At the bottom of this letter after Malakoff's signature appears the following in longhand: "At this date there are 200 shares issued in my name of which you are a partner. No shares have been distributed to any of my clients who invested in Nazareth."

On or about September 1, 1951, Mrs. Klein received a dividend check (make payable to Gertrude Silver) for $33.34 signed by John Malakoff, Agent and drawn upon the Corn Exchange Bank Trust Company. The words "Nazareth, Pa." appear over the endorsement of Gertrude Silver. This amount represents 1/12th of 20% of $2,000 and supports Mrs. Klein's testimony that as of September 1, 1951

she had invested with Malakoff in Nazareth the sum of $2,000. This testimony is also supported by an entry in Malakoff's ledger of a $2,000 advance from G. Silver in connection with his one-fourth interest in Nazareth. A check dated October 1, 1951 of John Malakoff, Agent in the sum of $41.34 was made payable to Gertrude Silver and bears her endorsement. Over her endorsement is the [fol. 88] word "Nazareth". This would seem to represent one month's interest on $2,000 and approximately one-third of a month's interest on an additional $1200. On November 1, 1951, December 1, 1951 and January 2, 1952 checks for $53.34 each of John Malakoff, Agent were issued to Gertrude Silver or G. Silver. These checks represent monthly interest on $3200 at the rate of 20% per annum.

On February 1, 1952, a check of John Malakoff, Special, in the sum of $66.14 was issued to Gertrude Klein. This check was endorsed Gertrude Klein and Gertrude Silver and was drawn upon the Corn Exchange Bank Trust Company, as were the three checks for $53.34. The difference of $2.80 between $66.14 and $53.34 apparently represented interest on an additional amount paid to Malakoff by Mrs. Klein in cash for investment in Nazareth.

Thereafter and on March 1, 1952, April 1, 1952, May 1, 1952, June 2, 1952, July 2, 1952, August 1, 1952 and September 1, 1952 checks for $100 each of John Malakoff, Special, drawn on the Corn Exchange Bank Trust Company were issued to G. Silver. These checks represent monthly interest at the rate of 20% per annum on $6,000. On October 1, 1952 a check of John Malakoff, Special in the sum of $133.34 was issued to G. Silver and drawn on the Corn Exchange Bank Trust Company. Over the endorsement of G. Silver is the word "Nazareth". The amount of this check is equal to 20% interest per annum on $8,000.

[fol. 89] On November 1, 1952, December 1, 1952 and January 2, 1953 checks of John Malakoff, Special, each for $233.34 drawn upon the Corn Exchange Bank Trust Company were issued to Gertrude Silver, G. Silver and Gertrude Silver Klein, respectively. On April 1, 1953 a check of John Malakoff for $233.34 drawn upon the Manufacturers Trust Company was drawn to the order of Gertrude Silver Klein. These checks represented interest of 20% per annum

on $14,000. Mrs. Klein also received dividend checks of $233.34 each in February and March 1953 from the bank account of Nazareth in the Second National Bank of Nazareth, Pennsylvania. In addition, she produced a check of John Malakoff dated May 1, 1953 payable to her order in the amount of $233.34 drawn upon the Manufacturers Trust Company which was returned unpaid because the account had been closed.

Stock Certificate No. 6 which was issued in the name of Gertrude Silver Klein is dated the 2nd day of February 1953 and is signed by Jerome Fried, Secretary, and John Malakoff, President. The certificate is for 14 shares but the numeral 14 and the word fourteen seem to have been written over a different numeral and a different word amount. The stub for Certificate No. 6 also indicates that the numeral 14 was written over a different numeral and this stub has the word "option" and the word "out". In a questionnaire which was sent to Mrs. Klein and sworn to by her on the 24th day of February 1954, Mrs. Klein stated as follows:

[fol. 90] "I gave Mr. Malakoff monies for investment in Nazareth as follows:

Apr. 2-1951	$2,000.
Sept. 20-1951	1,200.
Oct. 16-1951	2,000.
Jan. 21-1952	2,300.
Cash	500.

Money received from sale of Phila. property $6000. Mr. Malakoff asked me if I wanted to invest the money in Phila. property in Nazareth. I agreed. November 15, 1952 I received a form letter from Mr. Malakoff telling me that I was the owner of 14 shares of Nazareth stock. Feb. 2-53— received Stock Certificate for 14 shares."

The position of the debtor is that the amount of present consideration paid at the time of a particular purchase of Nazareth stock or interest by Mrs. Klein is for the court to determine. The debtor also charges that Mrs. Klein engaged in usurious transactions with Malakoff and that as

to some of her transactions with Malakoff in which she received Nazareth stock the consideration was an antecedent indebtedness. There is no clear evidence of any usurious transactions by Mrs. Klein with Malakoff, and whether or not there was a present, as distinguished from a past consideration at the time Mrs. Klein arranged to acquire Nazareth stock from Malakoff, is unimportant. Mrs. Klein undoubtedly advanced $14,000 to Malakoff at some time and he was indebted to her in that amount at the time the stock certificate was delivered to her, and prior thereto. In this case it seems clear that Malakoff paid the so-called dividends to Mrs. Klein upon an actual investment by her in Nazareth of $14,000.

[fol. 91] Mrs. Klein's total investment in Nazareth is $14,000. She received in dividends a total of $2,534.22. Her net investment in Nazareth is therefore $11,465.78. Accordingly, the sum of $11,465.78 constitutes the net fair value of Mrs. Klein's investment in Nazareth.

42. Claim No. 29 for 3 shares of Nazareth stock was filed by *Dorothy Holober Clark*. This claim is based upon Certificate No. 11 for 3 shares dated February 2, 1953. The consideration for the stock, as set forth in the proof of claim, was as follows: check of Dorothea Holober for $200 to John Malakoff dated March 11, 1952, check of Dorothea Holober for $500 to John Malakoff dated March 27, 1952, check of Dorothea Holober for $550 to Helen Bernstein dated July 30, 1952, check of Dorothea Holober for $1,125 to the order of Cash dated September 29, 1951 and $625 in cash paid to Helen Bernstein in or about October 1951. Power of attorney runs to Bernard Buchwald, Esq., 16 West 46th Street, New York, New York.

Objections to the allowance of Dorothy Holober Clark's Stock claim No. 29 were filed by the debtor and by Ida Mae Margolis, et al. The debtor objected on the ground that Malakoff had no title to the stock transferred to claimant and the further ground that no consideration passed to Nazareth. The Margolis objections attempt to incorporate certain objections filed by the debtor to the stock claims of Margolis, et al. Notice of a hearing on said objections was given by the Examiner to claimant and other parties in interest, including Bernard Buchwald, Esq.

[fol. 92] Dorothy Holober Clark is the wife of Barry Clark, another claimant. She met Malakoff and Helen Bernstein through Harold Masur, her husband's friend. Shortly after this meeting, Malakoff asked her whether she would like to buy shares in the Nazareth market. According to claimant, she told Malakoff that she did not have cash available but that if she could pay off the price in installments she would like to own three shares. Malakoff apparently agreed to this arrangement. After this arrangement was concluded, and in the early part of 1951, Mrs. Clark was employed by Malakoff and she worked in his office for two or three weeks.

Mrs. Clark testified that she gave Malakoff several checks to pay for her shares in Nazareth. In support of this testimony, she produced the following checks: check for $1,125 dated September 29, 1951 payable to Cash endorsed John Malakoff, Agent and deposited by him in the Corn Exchange Bank Trust Company, check for $200 to John Malakoff dated March 11, 1952 endorsed John Malakoff and John Malakoff, Agent, and deposited in the Corn Exchange Bank Trust Company, check for $500 to John Malakoff dated March 27, 1952 and endorsed John Malakoff and John Malakoff, Agent and deposited in the Corn Exchange Bank Trust Company and check for $550 to Helen Bernstein dated July 30, 1952 endorsed Helen Bernstein and Ambassador Estates, Inc., and deposited in an account in the Corn Exchange Bank Trust Company. These four checks were signed by Dorothea Holober and were all drawn on the National City Bank of New York, 86th Street Branch. In addition, claimant produced a check of the Manhattan Savings Bank for $500 dated June 1, 1951 payable to [fol. 93] Dorothy Holober. This check was endorsed over to Helen Bernstein and by her endorsed Helen Bernstein and Helen Rothschild. This check too was deposited in an account in the Corn Exchange Bank Trust Company.

Mrs. Clark also testified that she gave Malakoff $125 in cash three or four weeks after the last check was given to Malakoff but did not get a receipt therefor. This money she said she obtained as alimony from her former husband. When she paid for the three shares of stock, Mrs. Clark received a letter from Malakoff acknowledging receipt

of the money and stating that she was the owner of three shares of stock in Nazareth. The letter also stated that she would receive a stock certificate. This letter, Mrs. Clark testified, was returned to Malakoff at his request. She also testified that she made no other investment with Nazareth and had no other transactions with him. She said that the $3,000 given to Malakoff for investment in Nazareth was not returned to her. Mrs. Clark did admit that she exchanged checks with Malakoff on many occasions but she claims that she never received any moneys from him and made no profits in any transactions with him.

Claimant produced a letter which she testified accompanied the stock certificate which was sent to her by Malakoff in February 1953. This letter, which is dated February 2, 1953, states that formal certificate of stock evidencing Mrs. Clark's stock ownership in Nazareth is enclosed and requests the return of a letter agreement in which her interest in the corporation had been previously acknowledged. The stub for Stock Certificate No. 11 is regular on its face and contains no qualifications or conditions whatsoever.

[fol. 94] Claimant received 10 checks for $33.34 each dated the first or the 2d day of each month commencing with November 1951 and ending August 1952. These monthly payments represented 1/12th of 20% per annum interest on $2,000. These checks were signed by John Malakoff, Agent or John Malakoff, Special, were payable to D. Holober or Dorothy Holober and were drawn on the Corn Exchange Bank Trust Company. Claimant also received two checks for $50 each, one dated September 1, 1952 and the other October 1, 1952, signed by John Malakoff, Special, and drawn on the Corn Exchange Bank Trust Company. In addition, claimant received three checks for $45 each dated November 1, 1952, December 1, 1952 and January 2, 1953 signed by John Malakoff, Special and drawn upon the Corn Exchange Bank Trust Company. John Malakoff also gave her a check for $50 dated April 1, 1953 drawn on the Manufacturers Trust Company, which he redeemed in cash, and a check for $50 dated May 1, 1953 drawn on the Manufacturers Trust Company. Mrs. Clark got two $50 payments from the Nazareth account in the Second National

Bank of Nazareth, one in February and the other in March 1953. The $50 payments represented 1/12th of 20% per annum interest on $3,000 and the $45 payments represented 1/12th of 20% per annum interest on slightly less than $3,000.

It is clear that all of the monthly payments mentioned above represented so-called dividends on the investment made by Mrs. Clark on Nazareth stock. These dividends actually represented a return of capital. Mrs. Clark received a total of $768.40.

[fol. 95] The testimony of claimant is contradictory. Nevertheless, there is sufficient in the record to justify a finding that claimant actually advanced $3,000 to Malakoff for investment in Nazareth. The debtor calls attention to the fact that claimant's signature appears on the endorsement of a number of Malakoff checks but that has no real significance. Her testimony that she cashed these checks for Malakoff is believable under all the circumstances.

The sum of $2,231.60 constitutes the net fair value of the investment of Dorothy Holober Clark in Nazareth.

43. Claim No. 28 for 4 shares of Nazareth stock was filed by *Barry Clark*. This claim is based upon Certificate No. 12 dated February 2, 1953. The claim has a rider attached thereto stating that the $4,000 was paid as follows: check of East River Savings Bank to Helen Bernstein dated August 1, 1951 for $2,000; check of New York & Suburban Federal Savings & Loan Association to Helen Bernstein dated August 1, 1951 for $1,000 and check of East River Savings Bank to John Malakoff dated November 10, 1952 for $1,000. Power of attorney runs to Bernard Buchwald, Esq., 16 West 46th Street, New York, New York.

Objections to the allowance of Barry Clark's stock claim No. 28 were filed by the debtor and by Margolis, et al. The debtor's objections alleged that Malakoff did not own the stock certificate given to claimant and that no consideration passed to the debtor. The objections of Margolis charges lack of action against the Barry Clark claim by the debtor, and also that the claimant has offered no proof that the payments made to Helen Bernstein were

[fol. 96] ultimately received by Malakoff or the debtor. Notice of a hearing on the said objections was given by the Examiner to the claimant and other parties in interest, and claimant appeared in person at the hearing on the objections.

Clark first met Malakoff and Helen Bernstein through a friend, Harold Masur, early in 1951. About six months later, Malakoff asked Clark to buy stock in Nazareth, and he agreed to buy three shares at $1,000 per share. The actual purchase was made about one month thereafter. Claimant supported his testimony by producing photostatic copy of a check of the East River Savings Bank for $2,000 dated August 1, 1951 payable to Helen Bernstein and a check of the New York & Suburban Federal Savings & Loan Association for $1,000 was dated August 1, 1951 and payable to Helen Bernstein. The East River check was endorsed Helen Bernstein, John Malakoff, Agent, and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. The Loan Association check for $1,000 was endorsed Helen Bernstein and was deposited in the Corn Exchange Bank Trust Company, apparently in an account in the name of Helen Bernstein.

Claimant also produced a letter from John Malakoff dated August 1, 1951 addressed to Barry Clark stating that Malakoff was holding in escrow the sum of $4,000 which Clark had invested with him "in the deal in Nazareth, Penna., known as the Nazareth Farmers & Auction Market." This letter stated that Clark's investment represented four shares of stock in the transaction which Clark, in turn, would hold in escrow until the deal was consummated. [fol. 97] A return of 20% per annum payable monthly was promised. Clark testified that he did not get a receipt after giving Malakoff the two checks aggregating $3,000 despite the fact that he produced the receipt dated August 1, 1951. He also testified that he undertook to purchase the fourth share of Nazareth stock at some time prior to August 1 but on cross-examination said that he gave Malakoff his check for $1,000 for the fourth share on November 10, 1952. Later, on redirect examination, he said that he gave Malakoff $1,000 in cash on August 1, 1951, in addition to the moneys represented by the two checks for $1,000 and $2,000.

According to Clark, in 1952 he bought one share of stock in the Margaret Hotel for $1,000 and that was the only transaction that Clark had with Malakoff outside the Nazareth deal. Clark was positive he never loaned Malakoff $1,000 or any other money.

Stock Certificate No. 12 was received by Clark from Malakoff in a letter dated February 2, 1953. This letter stated that the certificate evidenced Clark's stock ownership and requested the return of the earlier letter agreement. The stub for Stock Certificate No. 12 indicates that the certificate was issued without any conditions or qualifications.

A check of John Malakoff, Agent, for $50 drawn on the Corn Exchange Bank Trust Company dated September 1, 1951 and payable to Barry bears the endorsement Barry and a stamp indicating that the check was deposited in the account of M. S. Sternberg, Special. Over the word "Barry" appears the following: "Nazareth, Pa." This [fol. 98] check undoubtedly represented a dividend to Barry Clark, although he denies endorsing it. He does, however, admit that he received a dividend of $50 in September 1951. On the first or second day of every month commencing with October 1951 and ending January 1952, checks of John Malakoff, Agent, or John Malakoff, Special, in the sum of $66.67 each were issued to Barry or Barry Clark or B. Clark and drawn upon the Corn Exchange Bank Trust Company. These checks were all duly endorsed and Clark acknowledges the receipt thereof. Clark also received a check of John Malakoff for $66.66 dated April 1, 1953 drawn upon the Manufacturers Trust Company and a Nazareth check for $66.67 drawn on the Second National Bank of Nazareth and dated February 2, 1953. The Siegel, Berg report does not reflect a payment of $66.67 to Clark in March 1953 from the account in the Second National Bank but Clark undoubtedly received the March 1953 dividend from Malakoff in one form or another. He also received a dividend check for May 1953 but that was returned from the bank unpaid.

Clark received a check for $1,000 drawn on the account of John Malakoff, Agent, in the Corn Exchange Bank dated

December 10, 1952. Clark's testimony is that he cashed this check for Malakoff. The debtor's position is that the court must determine whether Clark received this $1,000 in reduction of Clark's investment in Nazareth or whether he actually cashed the check for Malakoff as he testified he did.

Malakoff recognized Helen Bernstein as his agent. Malakoff should be charged with the receipt of the $1,000 Savings & Loan Association check payable to the order of Helen Bernstein. Malakoff's letter of August 1, 1951 ac- [fol. 99] knowledges receipt of $4,000 from Clark and the so-called dividend payments on $4,000 confirm the receipt by Malakoff of $4,000 for investment in Nazareth. The testimony of Clark that he cashed the $1,000 check for Malakoff is consistent with other testimony of Malakoff's practices, and Clark's testimony is worthy of belief.

Clark gave Malakoff $4,000 for investment in Nazareth. He received a total of $1,316.73 in so-called dividends. His net investment in Nazareth is therefore $2,683.27. Accordingly, the sum of $2,683.27 represents the net fair value of Barry Clark's investment in Nazareth.

44. Claim No. 22 for 4 shares of Nazareth stock was filed by *Harold Q. Masur*. This claim is based upon Certificate No. 13 dated February 2, 1953. The consideration for the stock, as set forth in the stock claim, is as follows: check of Union Square Savings Bank for $3,000 to Harold Q. Masur dated August 1, 1951 and endorsed over to Malakoff; claimant's check for $400 dated September 12, 1951 to Malakoff; check of Union Square Savings Bank for $500 to Harold Q. Masur dated November 10, 1952 and endorsed over to Malakoff; and claimant's check for $150 to Malakoff dated November 12, 1952. Power of attorney runs to Bernard Buchwald, Esq.

Objections to the allowance of Masur's stock claim No. 22 were filed by the debtor and Benjamin Margolis, et al. The debtor objected on the ground that Malakoff had no title and that no consideration passed to Nazareth. The Margolis objections attempt to incorporate objections filed by the debtor to the stock claims of Benjamin Margolis, et al. Notice of a hearing on the said objections was given by the

[fol. 100] Examiner to claimant, the attorney for the debtor and the attorney for the Margolis group of objectors. No notice was given to Bernard Buchwald, Esq. but the claimant appeared in person at the hearing on the objections.

Masur first discussed Nazareth with Malakoff around the middle of July 1951. Malakoff told him that he intended to take over a Farmers Market in Nazareth, that it looked like it might be a profitable proposition, and Malakoff invited Masur to drive with him to Nazareth. Masur was told that there were 200 shares of stock available.

On or about August 1, 1951, Malakoff persuaded Masur to take 3 shares of stock for which Masur gave him a check for $3,000. Masur has produced a photostatic copy of a check of the Union Square Savings Bank dated August 1, 1951 for $3,000 payable to his order. This check was endorsed to the order of John Malakoff by Harold Q. Masur and was then endorsed by John Malakoff and John Malakoff, Agent and deposited in the Corn Exchange Bank Trust Company. According to Masur, on September 12, 1951, Malakoff persuaded him to buy another share of stock. Masur's testimony was confusing as to how he paid for this additional share of stock. He testified that he gave Malakoff a check for $400 on that date and he has produced a check for that amount dated September 12, 1951 to the order of John Malakoff. This check was endorsed John Malakoff and John Malakoff, Agent, and was deposited in the Corn Exchange Bank Trust Company. Over the endorsement of John Malakoff appears the word "Nazareth" and the ink on this endorsement seems to correspond with [fol. 101] the ink used for the writings on the face of the check. Masur said that he did not give Malakoff the balance until November 1952 at which time he gave Malakoff a check of the Union Square Savings Bank for $500 and a couple of days later $100 in cash. This testimony cannot be accurate and Masur seems to have been confused. The first dividend check that Masur received from Malakoff is dated October 1, 1951 and is in the sum of $66.67. This amount represents 1/12th of 20% per annum interest on $4,000 so Masur must have given Malakoff the balance of $600 some time in September 1951. It is doubtful that Malakoff would have paid Masur a dividend on $600 which

he had not actually received from Masur. Masur testified that he entered into a deal with Malakoff involving a tavern in Larchmont and gave Malakoff $500 for that deal. He said that the deal fell through and Malakoff repaid Masur the $500 in cash around November 1951. Masur produced a check for $500 to Malakoff and over Malakoff's endorsement there is a reference to a Larchmont deal. This check is dated August 22, 1951. It is likely that the Larchmont deal fell through in September and that Masur used the $500 for his investment in Nazareth.

Beginning October 1, 1951 each month through May 1953, except for the months of February and March 1953, Masur received checks for $66.67 monthly from Malakoff representing dividends on his Nazareth investment. These checks were made by John Malakoff Agent, or John Malakoff, Special, and were drawn on the Corn Exchange Bank Trust Company or were made by John Malakoff and were drawn on the Manufacturers Trust Company. In addition, [fol. 102] Masur received $66.67 in February and March 1953 from the Nazareth account in the Second National Bank of Nazareth. Thus Masur received a total of $1,333.40.

When Masur first went to Nazareth, Pennsylvania, to see the market, he travelled with Malakoff. Masur did not ask Malakoff whether there was a corporation nor did he make any effort to get information as to operations. In his dealings with Malakoff, there was no talk about stock ownership in Nazareth but rather about a one-fiftieth interest in the market. Masur got from Malakoff a letter dated September 11, 1951 acknowledging that Malakoff was holding in escrow the sum of $4,000 which represented one-fiftieth ownership in the market. This letter stated that the return on Masur's investment would be 20% per annum, payable monthly. The stock certificate was actually received by Masur in a letter from Malakoff dated February 2, 1953. The stub for Certificate No. 13 is regular on its face and contains no qualifications or conditions whatsoever.

Masur was asked to answer a questionnaire by the attorney for the debtor. In this questionnaire, which was sworn to by Masur on January 28, 1954, Masur said that on September 12, 1951 he gave Malakoff a check for $400

and to the best of his recollection cash for the balance of one more share. At that time, so Masur said in the questionnaire, Malakoff took back a letter receipt which he had given to Masur on August 1, 1951, and gave Masur a second letter confirming Masur's investment of $4,000 for 4 shares, dated September 11, 1951. This answer of Masur to ques-
[fol. 103] tion 8 of the questionnaire is consistent with Malakoff having started to pay dividends on $4,000 on October 1, 1951.

The debtor calls attention to certain contradictions in Masur's testimony. These contradictions have been resolved satisfactorily. Masur was a truthful witness and simply could not recall precisely what had happened at times in his dealings with Malakoff. Concededly, Masur gave no money directly to Nazareth and there is no evidence of any indirect payments to Nazareth. Nonetheless, the sum of $2,666.60 constitutes the fair value of Masur's investment in Nazareth.

45. Claim No. 19 for 6 shares of Nazareth stock was filed by *Louis Como.* This claim is based upon Certificate No. 7 for 4 shares dated February 2, 1953 and Certificate No. 42 for 2 shares bearing the same date. The stated consideration for the said shares is $6,000. Power of attorney runs to Michael Berman, Esq., 37 Wall Street, New York 5, New York.

Objections to the allowance of Louis Como Stock Claim No. 19 were filed by the debtor and by Ida Mae Margolis, et al. The debtor's objections were the usual ones, to wit, that Malakoff had no title to the stock transferred to Louis Como and that no consideration passed to Nazareth.

The objections of the Margolis group alleged that the claimant had paid no consideration for the stock either to Malakoff or Nazareth; that claimant's stock was completely unauthorized because it was issued after the 200 shares of Nazareth stock had already been issued; and that the
[fol. 104] debtor's objections to the stock claims of the Margolis group should be deemed incorporated in the Margolis objections to the stock claim of Louis Como. Notice of a hearing on the aforesaid objections was given to Louis Como by the Examiner. Notice was also given to

the debtor's attorney, and the attorney for the Margolis group. No notice was given to Michael Berman Esq. but claimant appeared in person and testified in support of his stock claim.

Claimant Louis Como first met Malakoff in about 1945 when Malakoff was a customer of a service station and garage operated by Como. He had no business transactions with Malakoff, however, until August 1951. At that time, Malakoff talked to claimant about investing in Farmers Market and claimant visited the market on four different occasions. Malakoff told Como that the market belonged to him and he told claimant that he would get 20% return on his investment in the market.

According to claimant, he went to Malakoff's office in August 1951 and gave Malakoff $4,000 in cash for Nazareth stock. His brother, Frank, went with him and his brother also gave Malakoff $4,000 in cash for Nazareth stock. Louis Como testified that he obtained the $4,000 in cash that he gave to Malakoff by withdrawing $3,000 on February 19, 1951 from a savings account in the National City Bank of New York, and by using $200 in cash that he had in his home and $800 that he obtained from another source. The claimant's bank book with the National City Bank was produced and that reflects a withdrawal of $3,000 on Febru- [fol. 105] ary 19, 1951. Claimant testified that he kept this money at home until August 1951 when he gave it to Malakoff.

Claimant testified that he had another transaction with Malakoff towards the beginning of 1953. At that time he gave Malakoff $4,000 in cash for 2 shares of stock for himself and 2 shares for his brother, Frank. He got from Malakoff Stock Certificate No. 7 for 4 shares dated February 2, 1953 through the mails in a letter dated February 2, 1953, which letter he produced. Claimant's testimony was not entirely clear as to when he received the second Stock Certificate No. 42 for 2 shares. He testified that he got this stock certificate probably around the beginning of February or the end of January after he gave Malakoff an additional $2,000 but he also testified that the second purchase took place at the end of February or the beginning of March 1953.

Stock Certificate No. 7 is regular on its face. The stub for this certificate indicates that it was issued without any conditions or qualifications. Stock Certificate No. 42 for 2 shares, which is also dated February 2, 1953, contains an endorsement reading as follows:

> "This certificate represents two $1000— shares ($2000). At the present time the dividend is guaranteed at 20% per annum payable in equal monthly installments on the first day of each month. John Malakoff"

The stub for Certificate No. 42 is regular on its face and has no qualifications or conditions whatever written thereon.

[fol. 106] Louis Como testified that he received a series of 17 checks in the sum of $66.67 each signed by John Malakoff, Agent, or John Malakoff, Special, and drawn upon the Corn Exchange Bank Trust Company. The first of these checks is dated September 1, 1951 and the balance are dated on the first or second day of each and every month through January 1953. Some of the checks have the word "Nazareth" or the words "Nazareth, Pa." over the Como endorsement. Each check represents 1/12th of 20% per annum interest on $4,000. These checks tend to confirm the testimony of claimant that he actually gave Malakoff $4,000 in cash. It is doubtful that Malakoff would have paid the so-called dividends on $4,000 to Louis Como if he had not actually received $4,000 from him, whatever Malakoff might have done with some other claimant with whom he had many different transactions.

Louis Como testified that he did not receive checks for $66.67 each in February or March 1953. The Siegel, Berg & Company report on Nazareth dated August 21, 1953 lists Louis Como as having received a check for $66.67 dated February 2, 1953 and a check for the same amount dated March 2, 1953. Claimant admits that he received so-called dividend checks of John Malakoff dated April 1, 1953 and May 1, 1953 in the amount of $100 each drawn upon the Manufacturers Trust Company. These checks represent 1/12th of interest at the rate of 20% per annum on $6,000.

They support claimant's testimony as to the additional $2,000 given to Malakoff in February or March 1953. The May 1, 1953 check was cashed. It is certain that Louis [fol. 107] Como received the dividend checks for February and March 1953 which were drawn upon the bank account of Nazareth despite claimant's testimony to the contrary. Claimant would have insisted upon Malakoff paying the February and March dividends and undoubtedly would have refused to give Malakoff the additional $2,000 if those dividends had not been paid.

The debtor points out that the issue as to Louis Como's stock claim is whether he actually gave Malakoff $6,000 in cash for the purchase of 6 shares of stock. The debtor also calls attention to the vagueness of Louis Como's testimony as to the source of the $6,000 and to certain contradictions in his testimony. Despite the contradictions and vagueness it seems reasonably certain that Louis Como actually gave Malakoff $6,000 at some time for 6 shares of Nazareth stock. The business of Como was such that he easily could have accumulated $6,000 in cash. His testimony is not incredible. Claimant Louis Como received dividends totalling $1,466.73. There was no evidence in the record that during 1951, 1952 and 1953 Nazareth made sufficient net profit to justify the payment of dividends. These dividends therefore represented a return of capital by Malakoff. The sum of $4,533.27 constitutes the net fair value of Louis Como's investment in Nazareth.

46. Claim No. 18 for 6 shares of Nazareth stock was filed by *Frank Como*. This claim is based upon Certificate No. 9 for 4 shares and Certificate No. 41 for 2 shares. The consideration for the said stock is alleged to be $6,000. [fol. 108] Michael Berman, Esq. of 37 Wall Street, New York 5, New York, is designated as attorney in fact.

The debtor filed objections to the allowance of stock claim No. 18 on the ground that Malakoff did not own the stock that was issued to claimant and on the further ground that no consideration passed to Nazareth. Objections were also filed by the Margolis group on the ground that claimant paid no consideration to Malakoff or Nazareth for his stock, and upon the further ground that the stock issued

to claimant was in excess of the authorized capital stock of Nazareth. The Margolis group also attempted to incorporate the debtor's objections to the stock claims of the Margolis group as objections to the allowance of the stock claim of Frank Como. Notice of a hearing on the said objections was given by the Examiner to the claimant and other parties in interest. Notice was not given to Michael Berman, Esq. but claimant, Frank Como, appeared in person at the hearing on objections and offered testimony in support of his stock claim.

Frank Como met Malakoff for the first time in or around 1947 or 1948 through his brother, Louis. This was at Como's Gas Station where Frank Como customarily serviced Malakoff's car. Claimant took a trip with Malakoff to Nazareth early in August 1951. According to claimant, on August 14, he and his brother, Louis, went to Malakoff's office and each had $4,000 in cash. Frank Como gave Malakoff $4,000 and obtained a receipt for that money. Helen Bernstein and Malakoff's secretary were both present in Malakoff's office at the time. Frank Como was made to un- [fol. 109] derstand that he was buying shares in the Farmers Market not in a corporation or a partnership, and that he was paying $1,000 per share.

Frank Como testified that thereafter, and in January 1953 or possibly December 1952, he gave Malakoff $2,000 in cash for 2 additional shares of Nazareth stock. He did not get a receipt from John Malakoff for this $2,000 in cash. Later he got the 2 stock certificates, No. 9 and No. 41.

Frank Como produced a letter from Malakoff to him dated August 14, 1951. This letter states that Malakoff is holding $4,000 in escrow for which Frank Como holds 4 shares of Nazareth stock in escrow. These shares, so the letter states, "will represent at the present time a twenty-per-cent per annum return on your (Frank Como) investment, payable monthly." A footnote states that the 4 shares of stock will be forwarded to Frank Como "as soon as we (Malakoff) receive them." It also states that Como is to hold the shares "as security, in escrow, until the deal is consummated."

Frank Como further testified that he first received dividends on his Nazareth investment of $4,000 on or about September 1, 1951. This claimant undoubtedly received 17 checks of John Malakoff or John Malakoff, Special, drawn on the Corn Exchange Bank Trust Company for $66.67 each and payable on the first or second day of each month commencing with September 1951 and ending with January 1953. On three of these checks the word "Nazareth" appears over the endorsement of claimant. Each of these checks represents 1/12th of 20% per annum interest on [fol. 110] $4,000. Thus these checks, as well as the letter of August 14, 1951, tend to corroborate Frank Como's testimony that he actually gave Malakoff $4,000 in cash in August 1951.

The Siegel, Berg report discloses that Frank Como received $66.67 on or about February 2, 1953 and the same amount on or about March 2, 1953 from the Nazareth bank account in the Second National Bank. Frank Como also admits receiving a $100 check of John Malakoff dated April 1, 1953 and drawn upon the Manufacturers Trust Company. This check represents 1/12th of interest at the rate of 20% per annum on $6,000.

Stock Certificates No. 9 and 41 are regular on their face. Both certificates are dated the 2nd day of February 1953 and are signed by Jerome Fried, Secretary, and John Malakoff, President. Certificate No. 41 bears the following endorsement "This certificate represents two $1000. shares ($2000—). At the present time the dividend is guaranteed at 20% per annum payable in equal monthly installments on the first day of each month. John Malakoff." There is nothing upon the stubs of Stock Certificates No. 9 and 41 to indicate that they were subject to any conditions or qualifications.

The debtor states that the issue as to Frank Como is whether he actually gave $6,000 in cash to Malakoff for the purchase of 6 shares of Nazareth stock. The testimony of this witness as to the advance of $6,000 to Malakoff is not incredible and there is no reason why this testimony should be rejected. This claimant gave Malakoff $6,000 and re- [fol. 111] ceived a repayment thereof of $1,366.73. There is no evidence that any part of this $6,000 was turned over

to Nazareth but that is irrelevant in the light of the position taken by the Examiner. The evidence is clear that Frank Como, as well as his brother, Louis Como, gave their moneys to Malakoff for the express purpose of acquiring Nazareth stock.

The sum of $4,633.27 constitutes the net fair value of Frank Como's investment in Nazareth.

47. Claim No. 17 for 8 shares of Nazareth stock was filed by *Patsy Como*. This claim is represented by Certificate No. 37 for 6 shares and Certificate No. 38 for 2 shares. The stated consideration allegedly paid for such stock is $8,000. Michael Berman, Esq. is designated as attorney in fact.

Objections were filed to the allowance of Stock Claim No. 17 of Patsy Como by the debtor and the Margolis group on the same grounds set forth in the objections to the allowance of the stock claim of Frank Como. Notice of a hearing on the objections was given to Patsy Como and other parties in interest by the Examiner. Notice was not given to Michael Berman, Esq. but Patsy Como appeared and testified at the hearing on objections to the allowance of his stock claim.

Patsy Como testified that Louis Como acted for him in making an investment in Nazareth. In March 1953, Louis Como spoke to his brother, Patsy, and suggested that he make an investment in Nazareth. Louis Como then called Malakoff to find out how many shares his brother could purchase and he was told that he could have 6 shares. [fol. 112] According to Patsy Como, he gave his brother, Louis, $6,000 at his gas station in the presence of Helen Bernstein. Following that Louis Como went to Malakoff's office and give him the $6,000 and obtained a certificate for 6 shares. Patsy Como is undoubtedly truthful in stating that his brother gave Malakoff $6,000 for investment by him in Nazareth but that must have taken place in February or possibly in January 1953 because Certificate No. 37 for 6 shares is dated the 2nd day of February 1953. It is, of course, possible that Certificate No. 37 (as well as other certificates) had been dated long before Louis Como gave Malakoff the $6,000 in cash he had obtained from his

brother, in which event Patsy Como's testimony that he gave the money to his brother in March would be correct. Patsy Como did testify that he got Stock Certificate No. 37 around March 1953.

According to Patsy Como, he purchased 2 additional shares about thirty days after receiving Stock Certificate No. 37 for 6 shares. He claims that he gave Malakoff $2,000 in cash for the second purchase and then received Stock Certificate No. 38 for 2 shares. Patsy Como testified that prior to March 1953 he had approximately $15,000 or $18,000 in cash which he either kept in a savings account or used to purchase bonds. His recollection was that he cashed $8,000 in bonds and the moneys received were for a particular deal that was pending at the time and the deal apparently was never consummated. His story is that he put the moneys in a safe deposit box and did not touch those moneys until he used $6,000 to buy 6 shares of Nazareth stock.

[fol. 113] Patsy Como never lent any money to Malakoff or to Helen Bernstein. He also admitted that he did not issue any checks directly to Nazareth or make any direct payments to Nazareth for the purchase of stock.

Stock Certificates No. 37 and 38 are in the name of Patsy Como. Each certificate is dated the 2nd day of February 1953 and is regular on its face. Certificate No. 37 bears the following endorsement: "This certificate represents 6 one thousand dollars shares ($6000.00). This stock is guaranteed to earn a minimum of 20% per annum payable monthly. Therefore you will receive a check for one hundred dollars ($100.00), the first day of each month—John Malakoff." Certificate No. 38 has a somewhat similar endorsement signed by John Malakoff indicating that it represents $2,000 and is guaranteed to pay a minimum of 20% per annum in monthly payments of $33.34.

The stub for Certificate No. 37 has the word "void" written in ink thereof and then crossed out and the initials HB appear in pencil writing alongside of Patsy Como's name. The stub for Certificate No. 38 has the pencilled initials HB alongside Patsy Como's name. In all other respects the stubs seem to be regular and not subject to any conditions or qualifications. The initials HB probably stand

for Helen Bernstein and do not seem to have any real significance.

[fol. 114] Patsy Como produced a letter from the United States Treasury Department with an attached list of redeemed savings bonds in the name of Patsy Como which were cashed in 1951. This letter was introduced for the purpose of establishing the source of the cash funds that were used by Patsy Como to purchase the 8 shares of Nazareth stock. The Siegel, Berg report discloses that Patsy Como received a check for $133.33 on or about March 2, 1953 from the Nazareth account in the Second National Bank. This payment indicates that $8,000 must have been advanced by Patsy Como to Malakoff by February 1953. The report indicates that no payments were made to Patsy Como from the Nazareth bank account in February 1953. However, a check for $133.33 of John Malakoff to Pat Como dated April 1, 1953 and drawn upon the Manufacturers Trust Company was endorsed by Pat Como who undoubtedly received the cash therefor. In addition, Patsy Como testified that he received another check for $133.33, probably for May 1953, which was returned for insufficient funds and that his brother, Louis, collected approximately $60 on the check for Malakoff. $133.33 is 1/12th of interest at the rate of 20% per annum on $8,000. Patsy Como received in so-called dividends a total of $326.66 which actually represented a return of capital. No dividends were declared by Nazareth nor is there any evidence to indicate that sufficient moneys were earned by the company to justify the payment of dividends.

The issue as to stock claim of Patsy Como as posed by the debtor is whether $8,000 was actually given in cash by Patsy Como for the purchase of 8 shares of Nazareth [fol. 115] stock. Despite the contradictions in his testimony as to whether he ever went to Malakoff's office, Patsy Como had the resources with which to purchase 8 shares of Nazareth stock for $8,000 and there is sufficient evidence to indicate that he did so.

The sum of $7,673.34 constitutes the net fair value of Patsy Como's investment in Nazareth.

48. Claim No. 3 for 5 shares of Nazareth stock was filed by *Anne Bikales*. This claim is based upon Stock Cer-

tificate No. 16 dated the 2nd day of February 1953. Power of attorney runs to Jacob Weiswasser, Esq. The stated consideration for the said shares of stock is $5,000.

Objections to the allowance of Claim No. 3 were filed by the debtor and the Margolis group. The debtor's objections are the customary ones of no stock belonging to Malakoff and no consideration passing to Nazareth. The objections of the Margolis group attempt to incorporate the debtor's objections to the stock claims of the Margolis group as objections to the Bikales stock claim and also charge that claimant Bikales has failed to establish payment of $5,000 to Malakoff or anyone else. An answer to the objections was filed by claimant Bikales through Jacob Weiswasser, Esq., 261 Broadway, New York, New York. The objections were brought on for hearing by notice served by the Examiner upon stock claimant Bikales, Jacob Weiswasser, Esq., her attorney, and other parties in interest. Evidence adduced at the hearing on objections indicated that stock claimant Bikales on the 5th day of September 1957 had assigned her stock certificate to Alexander Fisher, her brother. Jacob Weiswasser, Esq., on behalf of Alexander Fisher, filed a reply to the debtor's [fol. 116] objection to the allowance of Stock Claim No. 3. This report addresses itself to the allowance of the stock claim itself without regard to the present ownership thereof.

Stock claimant Bikales became interested in Nazareth in July 1951 when she met Helen Bernstein and was invited to go with her to see the market in Nazareth. Claimant drove to Nazareth and back with Malakoff, Helen Bernstein and Harold Q. Masur, another stock claimant. Towards the end of July 1951, claimant made a second trip to Nazareth, this time in the company of Malakoff, Masur, Alexander Fisher, one Altman and Helen Bernstein. On this second trip Malakoff told claimant that stock in Nazareth costs $1,000 per share.

On August 30, 1951, claimant met Helen Bernstein for lunch and gave her $5,000 for an interest in Nazareth. Claimant received a receipt for the $5,000 signed by Malakoff and stating that she would have a 1/40th interest in the ownership of the market for her $5,000. The letter receipt also stated that Malakoff was holding the $5,000 in escrow

and that claimant would receive a 20% per annum return payable in monthly installments. The original of this receipt (photostatic copy being produced and marked in evidence) was returned to Malakoff at his request.

Stock claimant Bikales testified that she was given to understand she was buying stock in a corporation. In spite of this fact, she did not make out a check to the corporation but paid $5,000 in cash to Mrs. Bernstein. She obtained this $5,000 in cash from her brother, Alexander [fol. 117] Fisher, who had been keeping it for her in his safe deposit vault. According to Alexander Fisher, on the way back from Nazareth, Malakoff told Alexander Fisher that the value of the market was about $200,000 and that he was going to issue 200 shares of stock. Fisher says that he was present at a luncheon meeting between his sister and Helen Bernstein and that he brought $5,000 belonging to his sister and examined the receipt given to her by Helen Bernstein. He also said that the receipt was actually turned over to his sister on the day the money was given to Helen Bernstein, to wit, August 30, 1951. Neither he nor his sister had any deals with Malakoff other than Nazareth nor with Helen Bernstein. Fisher says that Malakoff represented to him that he, Malakoff, was president of the corporation and that he was selling stock of the corporation.

On the first or second day of each month starting with October 1951 and ending January 1953, stock claimant Bikales received a check for $83.34 of John Malakoff, Agent, or John Malakoff, Special, drawn upon the Corn Exchange Bank Trust Company. These checks represented so-called dividend payments on the Bikales investment in Nazareth. Several of the checks have the word "Nazareth" over the endorsement of the claimant Bikales. Stock claimant Bikales also received checks for $83.34 from the Nazareth Bank account in the Second National Bank in February and in March 1953. In addition, this claimant received two checks for $83.34 each from John Malakoff dated April 1, 1953 and May 1, 1953 drawn upon the Manufacturers [fol. 118] Trust Company. The fact that claimant Bikales actually gave Malakoff $5,000 in cash seems to be confirmed by these so-called dividend payments each of which repre-

sented 1/12th of interest at the rate of 20% per annum on $5,000. It is clear that claimant Bikales knew that she was not buying stock from the corporation and it is doubtful, in the light of the receipt given to her by Malakoff, that she knew of the existence of a corporation.

Stock claimant Bikales produced what purports to be a copy of a letter sent to Malakoff on February 6, 1953. This letter was intended to reply to a letter dated February 2, 1953 from Malakoff to claimant in which he enclosed Stock Certificate No. 16 for 5 shares dated the 2d day of February 1953 and requested the return of the previous letter agreement. The letter of February 6, 1953 contained the statement by claimant that the return of the letter receipt of August 30, 1951, so far as Bikales understood it, "does not alter my investment insofar as percentage of ownership and amount of return."

The stock certificate issued to claimant Bikales is regular on its face. The stub for the stock certificate is likewise regular on its face and contains no conditions or qualifications.

The debtor states that the issue of fact to be determined in relation to the claim of Anne Bikales is whether $5,000 in cash was actually paid by Anne Bikales, as she contends was done. The evidence is convincing that the cash was in [fol. 119] fact paid. The total in so-called dividend payments to claimant Bikales is $1,666.80. Accordingly, the sum of $3,333.20 constitutes the net fair value of claimant Bikales' investment in Nazareth.

49. Claim No. 13 for 2 shares of Nazareth stock was filed by *Lawrence Treat*. This claim is based upon Certificate No. 17 dated the 2nd day of February 1953. The stated consideration for the issuance of such stock is $2,000 represented by claimant's check for that amount to the order of Malakoff dated September 11, 1951. Power of attorney runs to Harold Q. Masur, 520 East 20th Street, New York City.

Objections to the allowance of Claim No. 13 were made by the debtor and by the Margolis group. The former objected on the ground that Malakoff did not own the stock that was given to Treat and that no consideration passed to

Nazareth. The latter objected claiming that the objections of the debtor to the stock claims of the Margolis group should be deemed objections to the allowance of the Treat stock claim. The objections were brought on for hearing by the Examiner by notice given to stock claimant Treat and other parties in interest. Notice was not given to Harold Q. Masur as attorney in fact for Treat but Treat appeared in person at the hearing on the objections to his stock claim and Harold Q. Masur appeared at the hearing on the objections to the allowance of his stock claim.

Stock claimant Treat first met Malakoff at Malakoff's office in New York City on September 11, 1951. Claimant went to Malakoff's office with his wife and expressed a desire to invest in Nazareth. Claimant told Malakoff that [fol. 120] he had heard about Nazareth and Malakoff described the proposition in very glowing terms. He told Treat that stock certificates were not yet available. Treat gave Malakoff a check for $2,000 dated September 11, 1951 drawn upon the First National Bank of Croton-on-the-Hudson. Endorsed on the back of this check is the following: "Re Nazareth Farmers & Auction Market, Nazareth, Pa.—2/200ths interest." This check was endorsed John Malakoff and John Malakoff, Agent and deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Treat received a letter from Malakoff dated September 11, 1951 acknowledging receipt of his $2,000 check and stating that Malakoff was holding the check in escrow for "2 200ths of the Nazareth Farmers & Auction Market Nazareth Pennsylvania." This letter also stated that the return on Treat's investment would be 20% per annum payable monthly and that as the income increased the return would increase proportionately. The original of this letter was returned to Malakoff at his request at a subsequent time and a copy thereof was retained by Treat.

Treat testified that he received 18 so-called dividend checks in connection with the Nazareth transaction. Each check was in the amount of $33.34 and except for one check of Nazareth dated February 2, 1953 and drawn upon the Second National Bank, all of the checks were signed by John Malakoff, Agent, John Malakoff, Special, or John Malakoff. The agent and special account checks were drawn

upon the Corn Exchange Bank Trust Company and the John Malakoff checks, two in number, were drawn upon the [fol. 121] Manufacturers Trust Company. These were monthly checks running from November 1953 through May 1953, except for March 1953. Treat also received a Nazareth check on the Second National Bank for $33.34 for the so-called dividend due in March 1953. Thus Treat received in all 19 checks for $33.34 each for a total of $666.80. Each check was equal to 1/12th of interest at the rate of 20% per annum on $2,000.

Treat testified that the February 1953 check of Nazareth drawn on the Second National Bank failed to clear that bank and was returned for insufficient funds. Nevertheless, the Siegel, Berg report discloses that two checks for $33.34 each were given to Lawrence Treat on or about March 2, 1953 and presumably cleared the bank. Therefore the unpaid February check was made good by a March check, the proceeds of which undoubtedly were received by Treat.

Treat had one other financial transaction with Malakoff involving the Hotel Margaret. He admitted that he had not given any consideration directly to Nazareth. He also testified that Malakoff told him on September 11, 1951 that stock would be issued and when it was issued Treat would receive a certificate. In the meantime, he was given the letter receipt. Treat did not ask Malakoff any questions about the operations or financial set-up or control of the company prior to the purchase of his stock. Treat, with Masur acting as his attorney in fact, made an assignment of his stock to Blanche Waldman but that is irrelevant [fol. 122] here. Stock Certificate No. 17 was mailed to Treat by Malakoff in a letter dated February 2, 1953 which requested the return of the original letter agreement. The stub for Stock Certificate No. 17 is regular on its face with no conditions or qualifications attached thereto.

It is clear that Lawrence Treat gave Malakoff $2,000 for investment in Nazareth. It is questionable that this money was advanced to Malakoff for the purpose of acquiring stock but that is not important. Treat received a return of capital in the amount of $666.80. Accordingly, the sum of $1,333.20 constitutes the net fair value of Treat's investment in Nazareth.

50. Claim No. 20 for 3 shares of Nazareth stock was filed by *Dorothy Kane*. This claim was based upon Certificate No. 19 for 3 shares dated the 2nd day of February 1953. No attorney in fact is designated.

The debtor objected to the allowance of Stock Claim No. 20 on the ground that Malakoff did not own the stock issued to the claimant and on the further ground that no consideration passed to Nazareth. Dorothy Kane filed a reply to the objections of the debtor in which, among other things, claimant asked to be allowed a money claim if the stock claim was held to be invalid. The stock of Dorothy Kane was subsequently transferred to Robert H. Davidson, and he filed a reply to a so-called counterclaim in the debtor's answer which asserted that if the stock claim of Dorothy Kane was sustained, she was indebted to Nazareth in the sum of $3,000, the unpaid subscription price. The so-called counterclaim was incorporated in substantially [fol. 123] all of the objections filed but has not been considered because of the findings and conclusions of the Examiner. Notice of a hearing on the debtor's objections was given to Dorothy Kane, the attorney for Davidson, Assignee, and other parties in interest by the Examiner.

Dorothy Kane met Malakoff in the winter of 1951. A friend, by the name of Mrs. Long, in July or August 1951 suggested that she buy stock in Nazareth and in July or August 1951, Dorothy Kane sent Malakoff a check for $2,000. This must have happened in September 1951 because claimant produced photostatic copy of a check of the Ridgewood Savings Bank for $2,000 dated September 18, 1951 payable to the order of John Malakoff. This check was endorsed John Malakoff and John Malakoff, Agent and was deposited in the Agent account in the Corn Exchange Bank Trust Company. Over Malakoff's endorsement appears the word "Nazareth".

After mailing the $2,000 check to Malakoff, claimant visited the Nazareth market with Malakoff and at his instance. The invitation came to her through Mrs. Long who accompanied her on the trip to Nazareth. This trip must have been made some time between September 18 and November 2, 1951.

On November 2, 1951, claimant sent Malakoff a check for $1,000 in order to purchase one additional share of stock. That this was done is evidenced by photostatic copy of a check for $1,000 of the Ridgewood Savings Bank dated November 2, 1951 payable to the order of John Malakoff. This check was endorsed John Malakoff and John Malakoff, Agent and deposited in the Agent account in the Corn Ex-
[fol. 124] change Bank Trust Company. In September 1951 claimant bought the stock because she relied upon the representations made by her friend. At that time she had not met Malakoff and had no personal knowledge of him. She relied upon the representations of her friend that Malakoff had an interest in Nazareth. When she met Malakoff, he did not tell her that he was President of Nazareth. When they drove to Nazareth, Malakoff told claimant that he owned the Nazareth Fairgrounds & Farmers Market, Inc. On the way down to the market in the car, claimant was led to believe that Malakoff owned all of the stock but this came out in casual conversation and she could not recall whether such a statemen' was made by Malakoff himself.

Dorothy Kane was given a receipt dated September 18, 1951 covering her initial investment of $2,000. This receipt in the form of a letter addressed to Dorothy Kane, recited that all of the authorized stock of Nazareth Farmers & Auction Market, Inc. which owned the market, had been issued to Malakoff. In this letter, Malakoff told claimant that he might cause to be issued to her 2 shares of his "present stockholdings". On the other hand, he might dissolve the corporation and arrange for the formation of a limited partnership in which she would be a limited partner and her $2,000 would be applied as her contribution with a corresponding proportionate interest. In a postscript to the letter, Malakoff stated that there were 200 shares issued and that Dorothy Kane would have 1/100ths of the deal. Dorothy Kane also received a letter acknowl-
[fol. 125] edgment of the receipt of the additional $1,000. This letter is dated November 1, 1951 and is substantially the same as the letter dated September 18, 1951 except that it applies to $1,000 and one share or 1/200ths interest in the venture.

The actual stock certificate was received by claimant on or about February 2, 1953. The certificate is regular on its face and has no qualifications or conditions. The stub for Certificate No. 19 is likewise regular on its face. Claimant received from Malakoff a check of John Malakoff, Agent, for $16.67, dated October 1, 1951. Over the endorsement of Dorothy Kane appears the following: "Nazareth up to 10/1 51." In addition, a check for $33.34 of John Malakoff, Agent drawn upon the Corn Exchange Bank Trust Company, as was the check for $16.67, was made payable to "Dorothy" and was endorsed as follows: "Nazareth, Dorothy, and M. S. Sternberg". This check was deposited in the Public National Bank & Trust Company. There seems to be no evidence that this check was actually given to or received by Dorothy Kane. None of the checks subsequently given to Dorothy Kane was deposited in the Public National Bank & Trust Company or bears the endorsement of M. S. Sternberg. The endorsement on this check seems to be unlike the endorsement of Dorothy Kane on other checks. Furthermore, it is doubtful that Malakoff would have given Dorothy Kane two separate checks, both dated October 1, 1951. A check of John Malakoff, Agent for $33.34 payable to the order of Dorothy Kane dated November 1, 1951 and endorsed Dorothy Kane was undoubtedly received by her and represented a so-called divi- [fol. 126] dend on her Nazareth investment. At that time the investment was $2,000. Between December 1951 and January 1953 each month on the first or second days a check of John Malakoff, Agent or John Malakoff, Special for $50 was issued to claimant and received by her. In February and March 1953, claimant received a check each month for $50 of Nazareth drawn on the Second National Bank of Nazareth. Claimant also received a check in April 1953 and one in May 1953 of John Malakoff drawn upon the Manufacturers Trust Company, each for $50. These $50 checks represented so-called monthly dividend payments on an investment of $3,000 at the rate of 20% per annum. Claimant received a so-called dividend check for June 1953 but that check was returned unpaid because it was drawn against uncollected funds. The total received by Dorothy Kane in so-called dividends was $950.01.

There can be no doubt about the investment of $3,000 by Dorothy Kane in the Nazareth enterprise. The sum of $950.01 was returned to her. Accordingly, the sum of $2,049.99 constitutes the net fair value of Dorothy Kane's investment in Nazareth.

51. Claim No. 34 for 4 shares of Nazareth stock was filed by *Miriam Klein*. This claim is represented by Certificate No. 22 for 4 shares. The stated consideration for the said stock is as follows: "Payment of $4,000.00 to John Malakoff, president of the debtor, for the purchase of four (4) shares of stock of the debtor corporation, said purchase being made in two transactions, one on Sept. 21, 1951, and second on about Feb. 1, 1953, for which Stock [fol. 127] Certificate No. 22 in the amount of four shares of the Debtor Corporation was issued to claimant on the second day of February, 1953 and signed by John Malakoff, President, and Jerome Fried, Secretary." No attorney in fact was designated.

Objections to the allowance of Miriam Klein Stock Claim No. 34 were filed by the debtor. These objections alleged that Malakoff did not own the stock that was issued to the claimant, and that no consideration passed to Nazareth. The objections also included a counter-claim that claimant pay $4,000 if her stock claim was sustained. Notice of a hearing on the debtor's objections was given to stock claimant Miriam Klein and to the attorney for the debtor.

Miriam Klein met Malakoff prior to September 1951 at the home of her mother-in-law, Gertrude Klein. At this meeting, Malakoff told Mrs. Klein that the Nazareth market was a good deal and if she made an investment in the market she would receive a 20% return. Miriam Klein on September 17, 1951 gave Malakoff a check for $1,200 payable to his order and drawn upon the Mount Vernon Trust Company. This check was endorsed John Malakoff and John Malakoff, Agent, and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Over the endorsement is the word "Nazareth". Mrs. Klein received from Malakoff a letter receipt dated September 21, 1951 at the bottom of which the following appeared: "1 100th of deal". The letter itself acknowledged receipt of a check without the amount thereof being stated, and re-

ferred to the possibility that Malakoff might cause to be [fol. 128] issued to Miriam Klein 2 shares of his then present stockholdings. A 1/100ths interest would represent an investment of $2,000 at $1,000 per share and $1,200 at $600 per share. There is no evidence that anything more than $1,200 was given to Malakoff by Mrs. Klein in September 1951.

On June 9, 1952, Bernard Klein issued a check for $1062.50 to John Malakoff and on July 18, 1952 a check for $1087.50. Both of these checks were endorsed by John Malakoff and were deposited in the Irving Trust Company in an account of the Hotel Wales, Wales Properties Inc. According to the testimony, these checks were given to Malakoff on behalf of Miriam Klein for the purpose of investment in real estate transactions. A profit of $100 was made on the first investment and a profit of $250 on the second. Thereafter there was a third real estate investment with the moneys previously advanced to Malakoff, and a profit of $300 was realized. According to Mrs. Klein, Malakoff asked her and her husband, Bernard Klein, whether they would be interested in purchasing additional shares of stock in Nazareth with the moneys invested on June 9, 1952 and July 18, 1952 and the profit thereon. This happened approximately February 1, 1953. Mrs. Klein acquiesced in this proposal and thereafter she received a stock certificate for 4 shares of Nazareth stock. This Stock Certificate, No. 22, was mailed to Miriam Klein in February 1953.

The stub for Stock Certificate No. 22 is dated 2/2/1953. There is a notation "(see 6)" and the legend "out" appears thereon. The stub for Stock Certificate No. 6, as [fol. 129] hereinabove stated, bears the legends "option" and "out". It also appears that the figure 14, indicating the number of shares of the stock certificate, was written over another figure. Gertrude Klein is the mother of Bernard Klein, husband of Miriam Klein. The connection between Certificates Nos. 6 and 22 is not at all clear.

No other written memorandum was received by Miriam Klein from John Malakoff at any time, that is with regard to Nazareth. Miriam Klein testified that other than the $1200 check of September 17, 1951 and the two checks of her husband dated June 9, 1952 and July 8, 1952, no other

checks were given to Malakoff or to any corporation with which he was connected. This testimony was corrected to indicate that the Kleins had another transaction with Malakoff in regard to the Hotel Margaret in Brooklyn. Bernard Klein produced four additional checks payable to Malakoff, all drawn on the Mount Vernon Trust Company and all endorsed by John Malakoff and John Malakoff, Agent, and deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. These checks were January 11, 1952, $5,000; January 11, 1952, $750, February 27, 1952, $1,000 and March 14, 1952, $2200. The check for $1,000 has the words "Hotel Margaret" over the endorsement of John Malakoff and the check for $750 has the words "Re 541 W. 13th St." which were crossed out. Miriam Klein testified that she and her husband gave Malakoff a total of $6,000 for investment in the Hotel Margaret and a letter receipt for $6,000 from Malakoff to Bernard Klein dated March 18, 1952 was produced and marked in evidence. [fol. 130] Mrs. Klein received a series of fifteen checks for $20 each signed John Malakoff, Agent, or John Malakoff, Special, and drawn upon the Corn Exchange Bank Trust Company. The first of these checks is dated November 1, 1951 and the last January 2, 1953. There is a check for each intervening month. On one of these checks the word "Nazareth" appears over the endorsement of M. Klein. Each check is 1/12th of 20% interest per annum on $1200. Two checks for $66.67 each were given to Miriam Klein in February and March 1953 from the Nazareth account in the Second National Bank of Nazareth, Pennsylvania. The sum of $66.67 represents 1/12th of interest at the rate of 20% per annum on $4,000. These checks support Miriam Klein's testimony that the moneys given to Malakoff for investment in June and July 1952 which totalled $2150 plus the alleged profit on the three real estate investments were retained by Malakoff and applied for an additional investment on behalf of Miriam Klein pursuant to agreement of the parties made on or about February 1, 1953. The claimant also testified that she received two checks for $66.67 each of John Malakoff drawn on the Manufacturers Trust Company, one dated April 1, 1953 and the other April 30, 1953 which represented additional

so-called dividend checks on her investment of $4,000 in Nazareth stock. These checks were marked in evidence. Thus claimant received a total of $566.68.

Miriam Klein testified that neither she nor her husband at any time lent any money to Malakoff. She was confronted with a number of checks of John Malakoff, Agent payable to her order, some for $500 and others for $250 but [fol. 131] she could not explain what these checks represented. These checks were deposited in her bank accounts. Her husband was employed by Malakoff and was the manager of the Hotel Wales for about two years. Her husband did get some dividend checks for $100 each in connection with his investment in the Hotel Margaret.

The testimony of both Miriam Klein and her husband, Bernard Klein, is to the effect that the first two shares of Nazareth stock were sold to Miriam Klein at $600 per share. They also testified that the additional two shares were sold to them for $1400 per share. Bernard Klein testified that the $500 and $250 checks which his wife could not identify, represented a return of moneys that had been given to Malakoff for the purpose of investing in the Hotel Margaret.

The debtor points out that the testimony of Miriam Klein and her husband, Bernard Klein, is contradictory. The debtor contends that they apparently were engaged in usurious transactions with Malakoff. The testimony of claimant and her husband is contradictory and a clear explanation has not been given with respect to the checks received from Malakoff. Nevertheless, it appears reasonably certain that Miriam Klein at least gave Malakoff the three checks, that is those of September 17, 1951 for $1200, June 9, 1952 for $1062.50 and July 18, 1952 for $1087.50 which ultimately were invested in Nazareth. It may be true that Malakoff told Mrs. Klein that she had made a profit of $650 in all on three real estate transactions which would be applied to Nazareth stock but there is insufficient [fol. 132] evidence to support the existence of a profit in fact. It is true that Malakoff did not ordinarily pay dividends on moneys not actually received by him but it is reasonable to believe that he was willing to pay dividends on an additional $650 in order to be able to retain the aggre-

gate of the checks for $1062.50 and $1087.50. It is also hard to believe that Miriam Klein, whose husband had been employed by Malakoff, would pay $1400 a share for Nazareth stock in January or February 1953, at a time when he was selling the stock for $1,000 per share to others, and particularly after having purchased Nazareth stock from him for $600 per share. Miriam Klein should be credited with an investment representing the aggregate of the three checks or a total of $3,350. She received a return of capital by way of so-called-dividend payments in the sum of $566.68. Accordingly, the sum of $2,783.32 constitutes the net fair value of Miriam Klein's investment in Nazareth.

52. Claim No. 36 for 3 shares was filed by *Ruth Spielholz* based upon Certificate No. 21 dated the 2nd day of February 1953. The proof of debt states that the stock was purchased in two transactions, one on September 19, 1951 and the other on January 26, 1953.

Objections to the allowance of the claim of Ruth Spielholz were filed by the debtor on the ground that Malakoff had no title to the stock which was issued to her and on the further ground that no consideration passed to Nazareth. Notice of hearing on the objections was given by the Examiner to the claimant and the debtor.

[fol. 133] It appears that Malakoff was a friend of Mrs. Spielholz' family for many years. Mrs. Spielholz is related to Gertrude and Miriam Klein, other stock claimants in this proceeding. In September 1951, claimant saw Malakoff and his sister, Alice Malakoff. At that time Malakoff spoke about Nazareth and a week or two thereafter, having talked it over with her husband, Mrs. Spielholz sent Malakoff a check for $1200. This check was drawn on the Mount Vernon Trust Company, was dated September 19, 1951 and was endorsed John Malakoff and John Malakoff, Agent. The check was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Over the endorsement of John Malakoff appears the word "Nazareth".

At the first meeting in September 1951, Malakoff told Mrs. Spielholz and her husband that they would get a return of 20% on their investment. He did not mention whether he owned the business or whether they would

receive evidence of their ownership in the form of stock certificates or whether they were going to be partners in the business. Thereafter, and in January 1953, Ruth Spielholz sent Malakoff a check for $1800 for an additional investment in Nazareth stock. This check was dated January 26, 1953, was made payable to John Malakoff and was endorsed by him and deposited in an account in the New York Trust Company. This second check was sent to Malakoff as the result of a telephone call from him to claimant's husband in which her husband was told that Malakoff was going to issue shares and that he would send three shares in Nazareth corporation upon receipt of an additional $1800. Stock Certificate No. 21 was sent to Mrs. Spielholz.

[fol. 134] Mrs. Spielholz did not have any other transactions with Malakoff nor did her husband. She did not lend Malakoff any money nor receive any checks from him. Malakoff never repaid Mrs. Spielholz the amount of her investment in Nazareth.

Mrs. Spielholz received a check for $6.67 of John Malakoff, Agent dated October 1, 1951 and drawn upon the Corn Exchange Bank Trust Company. This check was endorsed by Ruth Spielholz and over her endorsement appears the word "Nazareth". This check represented a pro-rata dividend upon the $1200 investment. Mrs. Spielholz also received fifteen monthly checks for $20 each of John Malakoff, Agent or John Malakoff, Special, running from November 1951 through January 1953. These were monthly dividend checks representing a 20% per annum return on $1200. She also received a $20 check dated February 2, 1953 of Nazareth and a $50 check of Nazareth dated March 2, 1953 drawn upon the Second National Bank of Nazareth, Pennsylvania. The first check represented the February dividend on $1200 and the second check, the March dividend on $3,000. Mrs. Spielholz also received a check of John Malakoff for $50 dated April 1, 1953 drawn upon the Manufacturers Trust Company. Thus claimant received a total of $426.67.

Stock Certificate No. 21 is regular on its face. The stub for this certificate, however, has the legend "out" appearing thereon. No satisfactory explanation has been offered as to

the reason for the appearance of this word on the stock stub. Apart from this factor, there is nothing in the record to indicate that Ruth Spielholz and Malakoff did not enter into a perfectly proper transaction under which Ruth Spielholz agreed to buy and Malakoff agreed to sell three shares [fol. 135] of Nazareth stock. The sum of $3,000 was paid to Malakoff and claimant expected to get and did receive a stock certificate for 3 shares. No part of the consideration has been traced to Nazareth but that is not important in the view the Examiner has taken of the situation. Accordingly, the sum of $2,573.33 constitutes the net fair value of the investment of Ruth Spielholz in Nazareth.

53. Claim No. 4 for 2 shares of Nazareth stock was filed by *Mae Bluestone* based upon Stock Certificate No. 24 dated the 2nd day of February 1953. The proof of debt states that $2,000 was paid for the stock and it contains a power of attorney running to Jacob Weiswasser, Esq.

Objections to the allowance of the stock claim of Mae Bluestone, No. 4, were filed by the debtor and by Benjamin Margolis, et al. The objections of the debtor were that Malakoff had no title to the certificate issued to claimant and no consideration passed to Nazareth. The objections of the Margolis group attempted to incorporate as objections to Stock Claim No. 27 the objections of the debtor to the allowance of the stock claims of the Margolis group. The debtor's answer also included a counterclaim for $2,000. Claimant replied to the debtor's objections claiming lack of jurisdiction in the court, Statute of Limitations and estoppel. Notice of hearing on the said objections was given by the Examiner to the claimant, her attorney in fact, and other parties in interest.

[fol. 136] Mrs. Bluestone met Helen Bernstein while visiting friends. Helen Bernstein spoke to her about Malakoff and about the stock in Nazareth that he was selling. Mrs. Bluestone visited Malakoff's office in October 1951 and discussed buying stock. She evidently agreed to buy 2 shares for $2,000 and gave Malakoff a check of Henry Bluestone for that amount dated October 31, 1951 drawn on the Manufacturers Trust Company, 711 Lexington Avenue, New York. This check was endorsed as follows: "2

shares Mae Bluestone Nazareth Farmers & Auction Market 1/100th share of business, John Malakoff, John Malakoff Agt." The check was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. The legend appearing over the Malakoff endorsement on the check was placed thereon by Mae Bluestone. She received a letter receipt from Malakoff when the check was delivered but she does not know what happened to that letter. Thereafter, and in a letter dated February 2, 1953, Stock Certificate No. 24 was forwarded to her. This letter requested the return of the letter agreement previously given to her.

Commencing on December 1, 1951 and monthly thereafter through January 1953, Mae Bluestone received a check for $33.34 of John Malakoff, Agent or John Malakoff, Special drawn upon the Corn Exchange Bank Trust Company. She also received a check dated February 2, 1953 for $33.34 and a check dated March 2, 1953 for $33.34 of Nazareth drawn upon the Second National Bank of Nazareth. In addition, she received a check of John Malakoff for $33.34 dated April 1, 1953 drawn upon the Manufacturers Trust Company. She also received checks for the same amount [fol. 137] of John Malakoff drawn upon the Industrial Bank of Commerce dated May 25, 1953 and June 4, 1953 but both of these checks were returned to her unpaid. Mrs. Bluestone visited the Nazareth market a few months after she purchased the stock.

Mrs. Bluestone did not have any other transactions with Malakoff. She does recall that when she went to Malakoff's office for her first appointment at which time she purchased the stock, Malakoff informed her that she would get a dividend of 20% and that the stock would cost $1,000 per share. In this first conversation, Mrs. Bluestone got the impression that Nazareth belonged to Malakoff. Concededly Mrs. Bluestone paid no money directly to Nazareth nor was any part of the consideration paid by her to Malakoff traced to Nazareth.

Stock Certificate No. 24 is regular on its face. The stub for that certificate contains no qualifications or conditions of any kind. Mrs. Bluestone advanced $2,000. She received in return of capital by way of so-called dividends the sum

of $566.78. Accordingly, the sum of $1,433.22 constitutes the net fair value of Mae Bluestone's investment in Nazareth.

54. Claim No. 33 for 2 shares of Nazareth stock was filed by *Gussie Schwartz* based upon Stock Certificate No. 30 dated the 2nd day of February 1953. The stated consideration is a check of Harold B. Schwartz to the order of Helen [fol. 138] Bernstein in the sum of $2,000 dated January 14, 1953 and endorsed "For investment in Nazareth Farmers Mkt. for 2 shares." Power of attorney runs to Bernard Buchwald, 16 West 46th Street, New York City.

Objections to the allowance of Stock Claim No. 33 of Gussie Schwartz were filed by the debtor on the ground that Malakoff had no title to the stock that was issued to claimant and on the further ground that no consideration passed to Nazareth. The debtor also pleaded a counterclaim for $2,000, the unpaid subscription price. Notice of a hearing on said objections was given by the Examiner to claimant and the attorney for the debtor. Harold Schwartz, son of Gussie Schwartz, appeared at the hearing on objections on behalf of claimant and testified that he acted with authority from his mother in the acquisition of 2 shares of Nazareth stock.

According to Harold Schwartz, he gave Helen Bernstein a check for $2,000 for the purchase of 2 shares of Nazareth stock at a reception given by Helen Bernstein at the Waldorf on January 14, 1953. The check, he said, was made payable to Helen Bernstein at her request. He produced the check for $2,000 which is dated January 14, 1953 and bears the following endorsement "For investment in Nazareth Farmers Mkt. for 2 shares Gussie Schwartz, Helen Bernstein, ok for cash M. S. Sternberg." Harold Schwartz also testified that at the time the $2,000 check was given to Helen Bernstein he received Stock Certificate No. 30 issued in his mother's name. It is doubtful that he got the stock certificate at that time since the certificate is dated the 2nd day of February, 1953. However, he apparently got [fol. 139] the long form of letter receipt given by Malakoff to some of the Nazareth investors. This receipt was dated January 14, 1953 and acknowledged receipt of check for

$2,000 for which Malakoff might cause "to be issued to you (Gussie Schwartz) 2 shares of my (Malakoff's) present stockholdings." As a matter of fact, this receipt seems to have been given to Harold Schwartz in duplicate with the view of having his mother sign a copy thereof and return the same to Malakoff. There is nothing in the record to indicate that the $2,000 actually was received by Malakoff but the record clearly shows that Helen Bernstein was acting as Malakoff's agent in the sale of Nazareth stock and the letter receipt signed by Malakoff tends to support this conclusion.

Stock Certificate No. 30 is regular on its face, as is the stub for this certificate. There is nothing either on the certificate or the stub which indicates that the stock was issued subject to any conditions or limitations.

Harold Schwartz testified that his mother, Gussie Schwartz, received five so-called dividend checks, the last two of which were uncollectible. The first check seems to have been a Nazareth check for $16.67 dated February 2, 1953 and drawn upon the Second National Bank of Nazareth, Pennsylvania. On or about March 2, 1953, a Nazareth check for $33.34 drawn on the same bank was issued to Gussie Schwartz and undoubtedly was honored when presented. Gussie Schwartz also received a check for $33.34 dated April 1, 1953 drawn on the Manufacturers Trust Company. Claimant produced a check of John Malakoff [fol. 140] dated June 4, 1953 in the sum of $33.34 drawn upon the Industrial Bank of Commerce which was returned unpaid for insufficient funds. Claimant did not produce an unpaid check for May 1953 in the amount of $33.34 but on the basis of the testimony of Harold Schwartz claimant received a check for that month's dividend, which, however, was not honored when presented for payment. Therefore the total of the so-called dividends which claimant received is $83.35.

It is conceded that Gussie Schwartz paid no money directly to Nazareth for her Nazareth stock certificate. The record also fails to establish that the $2,000 given to Helen Bernstein by Gussie Schwartz ultimately found its way into the Nazareth bank account. Nonetheless, this claimant invested $2,000 with Malakoff for the specific purpose of buy-

ing Nazareth stock. She received by way of return of capital $83.35. Accordingly, the sum of $1,916.65 constitutes the net fair value of Gussie Schwartz' investment in Nazareth.

55. Claim No. 21 for 4 shares of Nazareth stock was filed by *Harold B. Schwartz* based upon Stock Certificate No. 29 dated the 2nd day of February 1953. The stated consideration for this stock is as follows: claimant's check for $2,000 dated July 23, 1952 to the order of John Malakoff and claimant's check dated January 14, 1953 to the order of Helen Bernstein in the sum of $2,000. The power of attorney runs to Bernard Buchwald, Esq.

Objections to the allowance of Stock Claim No. 21 of Harold Schwartz were filed by the debtor and by the Margolis group. The debtor's objections were similar to those interposed to the allowance of the claim of Gussie [fol. 141] Schwartz. The objections of the Margolis group charged that the stock acquired by claimant was stock sold by Malakoff in excess of the authorized issue of 200 shares. These objections also attempted to incorporate as objections to the claim of Harold B. Schwartz, the objections made by the debtor to the allowance of the claim of the Margolis group. Notice of a hearing on the said objections was given by the Examiner to the claimant and the attorney for the debtor. Claimant appeared in person at the hearing on the objections.

Harold B. Schwartz visited the Farmers Market on July 23, 1952 with Harold Q. Masur and was shown around the market by Masur and Malakoff. He spent the entire day at the market. He drove down and back in Malakoff's car. On the way back in answer to an inquiry addressed to Malakoff, he was told that stock in the market would cost $1,000 per share. Claimant told Malakoff that he would take two shares in the market and he was instructed to make the check to John Malakoff. Claimant produced a check for $2,000 made by him payable to the order of John Malakoff dated July 23, 1952. The endorsement on this check reads as follows: "Investment for Nazareth Farmers Market John Malakoff, John Malakoff, Agt." This check was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company.

At or shortly after the time claimant gave Malakoff his check for $2,000 he received in duplicate the long form letter receipt signed by Malakoff and acknowledging receipt of $2,000. He was requested to sign the duplicate and return it to Malakoff but he did not do so. This letter receipt re-
[fol. 142] ferred to the possible issuance by Malakoff to claimant of two shares of Malakoff's "present stockholdings."

Harold Schwartz testified that on January 14, 1953 he did purchase two additional shares of stock for himself and also two shares for his mother, Gussie Schwartz. He said that he had met Helen Bernstein, at a few social occasions and at a party which she gave, through Harold Masur, some time in 1952 or 1953. He was informed that Helen Bernstein was a secretary for or agent of Malakoff. He saw Miss Bernstein at her suite in the Waldorf and asked her if he could purchase four additional shares of Nazareth stock, presumably two for himself and two for his mother. He issued a check to Helen Bernstein dated January 14, 1953 in the sum of $2,000. The endorsement on this check is as follows: "For investment in Nazareth Farmers Mkt. for 2 shares Harold B. Schwartz, Helen Bernstein, ok for cash M. S. Sternberg." This check was evidently cashed by Helen Bernstein. There is nothing in the record showing that this money reached Malakoff or Nazareth. Nevertheless, Helen Bernstein was acting as the agent for Malakoff in the sale of Nazareth stock and a receipt that Harold Schwartz got for his $2,000 check is dated January 14, 1953 and is signed by Malakoff.

Stock Certificate No. 29 for 4 shares was sent to claimant by Malakoff in a letter dated February 2, 1953. There is nothing on this certificate nor on the stub therefor which indicates that the stock was issued to claimant subject to any conditions or qualifications.

[fol. 143] Claimant received a check for $8.33 dated August 1, 1952 signed John Malakoff, Special. This check apparently represented the accrued dividend on the investment of $2,000 that claimant had made with Malakoff on July 24, 1952. In September, October, November and December 1952 and January 1953, claimant received checks of John Malakoff, Special for $33.34 each. The word "Naz-

areth" appears over the endorsement on one of these checks. Each check is 1/12th of interest at the rate of 20% per annum on $2,000. Claimant also received a check for $66.67 of John Malakoff drawn on the Manufacturers Trust Company dated April 1, 1953. In addition, a check for $66.67 dated March 2, 1953 was issued to Harold Schwartz by Nazareth and drawn upon its account in the Second National Bank of Nazareth. Claimant produced a Nazareth check for $50 dated February 2, 1953 payable to him and drawn upon the Second National Bank of Nazareth which was returned because of insufficient funds, and a check for $66.67 of John Malakoff dated June 4, 1953 drawn upon the Industrial Bank of Commerce which was likewise returned for insufficient funds. Claimant testified that he received monthly checks until April 1, 1953 and that he received no payments other than those which were marked in evidence. It would therefore appear that claimant did not receive a dividend in May 1953. The total dividends received by claimant is $308.37.

Claimant gave to Malakoff, either directly or indirectly, the sum of $4,000 for investment in Nazareth. Claimant [fol. 144] acted in good faith. The sum of $308.37 was returned to claimant. Accordingly, the sum of $3,691.63 constitutes the net fair value of Harold B. Schwartz' investment in Nazareth.

56. Claim No. 30 for 2 shares of Nazareth stock was filed by *Lazar Karapontso* based upon Certificate No. 39 dated the 2nd day of February 1953. Power of attorney runs to Bernard Buchwald, Esq. The stated consideration for the stock is a check of the Central Savings Bank in the sum of $1,000 dated November 10, 1952 payable to John Malakoff and the sum of $1,000 in cash allegedly paid to Malakoff on or about November 12, 1952.

Objections to the allowance of Claim No. 30 were filed by the debtor and by the Margolis group. The debtor's objections were similar to those asserted against the allowance of the stock claim of Gussie Schwartz. The objections of the Margolis group attempted to incorporate as objections to the Karapontso stock claim objections filed to the allowance of stock claims of the Margolis group. In addi-

tion, the Margolis group charged that Karapontso had failed to establish the payment to Malakoff of $1,000 in cash. The hearing on the said objections was brought on by the Examiner on notice to claimant, Bernard Buchwald, Esq., the attorney for the debtor and the attorney for the Margolis group.

Karapontso learned about the Nazareth market in the early part of 1952 through two of his friends, Masur and Clark. A couple of months after his first conversation with them, Karapontso and Clark drove to Nazareth. Clark told him that he had invested in Nazareth at the rate of $1,000 per share and was receiving a dividend of 20% on his in- [fol. 145] vestment. Later, in the Spring or Summer of 1952, Masur introduced Mrs. Bernstein to Karapontso. In December 1952, Karapontso and Clark went to Malakoff's office at which time Karapontso purchased two shares of Nazareth stock.

Karapontso gave Malakoff a check of the Central Savings Bank for $1,000 dated November 10, 1952, which was endorsed John Malakoff and John Malakoff, Agent, and deposited in the Agent account in the Corn Exchange Trust Company. Karapontso was given a receipt by Malakoff and was told to keep the receipt until he received his stock certificate. Karapontso no longer has that receipt. Karapontso received from Malakoff Stock Certificate No. 39 dated the 2nd day of February, 1953. On the reverse side of this certificate, the following appears: "This represents two—one thousand shares ($2,000.00). You will receive 20% dividend per annum, payable in equal monthly payments of thirty-three .34 (33.34) on the first day of each month." The stub for Certificate No. 39 is regular on its face and does not show that the stock was issued subject to any limitations or conditions.

Karapontso claimed that he had given Malakoff $1,000 cash at the time he gave him the $1,000 check issued by the Central Savings Bank. He also testified that he received dividend payments from Malakoff on his $2,000 investment in the form of three or four checks which commenced one month from the time that he gave the $2,000 to Malakoff. The last dividend payment received by Karapontso was in the form of cash because Malakoff told him that there was

some kind of a tie-up and that he could not send a check out but would give him cash.

[fol. 146] The Siegel, Berg report shows that a check for $33.34 was given to Karapontso from the Nazareth account in the Second National Bank on March 2, 1953. This represents 1/12th of annual interest at the rate of 20% per annum on $2,000. The $2,000 was claimed to have been given to Malakoff on November 10, 1952. Claimant should have received an adjusted dividend on December 1, 1952 and dividends of $33.34 in January and February 1953 and April 1953. In addition, claimant must have received a cash dividend from Malakoff for May 1953 when Malakoff was having difficulty in making dividend payments. Therefore it seems fair to say that claimant received a total of $188.92 in so-called dividends but actually representing a return of capital.

Claimant's testimony that $1,000 in cash was advanced was not supported by any written documents but this claimant seems to have been a truthful witness and his testimony in this respect should be accepted. He gave Malakoff $2,000 for an investment in Nazareth and Malakoff acknowledged receipt thereof by the endorsement of the stock certificate. The dividends also support an investment of $2,000. Since the sum of $188.92 was returned the balance of $1,811.08 represents the net fair value of the investment of Lazar Karapontso in Nazareth.

57. Claim No. 40 for 9 shares was filed by *Ernest Pollak* based upon Certificate No. 31 dated the 2nd day of February 1953. There is no power of attorney attached to this claim although the name of Richard S. Hull, Esq. appears on the cover of the proof of stock claim. The stated consideration for the issuance of the stock is as follows: a [fol. 147] check for $7,000 to John Malakoff dated December 15, 1952, a check for $500 to John Malakoff dated December 11, 1952 and $1500 in cash paid to Malakoff on or about December 16, 1952.

Objections to the allowance of Stock Claim No. 40 of Ernest Pollak were filed by the debtor on the same grounds as to the objections to the stock claim of Gussie Schwartz. The Margolis group also filed objections to the allowance of

the stock claim, on the same grounds as it objected to the stock claim of Lazar Karapontso except that the Margolis group charged that there was no proof of payment to Malakoff of $1500 in cash. Notice of a hearing on the objections was given by the Examiner to Pollak, Joseph Tiefenbrun, Esq., who had filed an answer on behalf of Pollak to the Margolis objections, to Melvin L. Robbins, Esq., attorney for Robert H. Davidson, Assignee, and to the attorney for the debtor and the attorney for the Margolis group.

Pollak first met Malakoff around December 1952. He was introduced to Malakoff by Anne Rosen in Malakoff's office in New York. Pollak purchased stock from Malakoff giving him $7500 in two checks, one for $500 and the other for $7,000 and approximately one week later Pollak gave Malakoff the remainder in cash. Pollak produced two checks, one for $500 dated December 11, 1952 payable to John Malakoff, Agent, and the other dated December 15, 1952 for $7,000 payable to John Malakoff. The first check was endorsed John Malakoff, Agent and the second John Malakoff and John Malakoff, Agent. Both checks were deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company.

[fol. 148] Pollak did not get a receipt from Malakoff but did receive a stock certificate on or about February 2, 1953 at Malakoff's office. Stock Certificate No. 31 is regular on its face, as is the stub for that certificate. There is nothing either on the stub or on the certificate to indicate that the stock was issued subject to any conditions or qualifications.

After the Nazareth transaction, Pollak was involved in other transactions with Malakoff. The Nazareth transaction was his first with Malakoff. On December 29, 1952, Pollak claims to have given Malakoff $4,400 with respect to a proposition in Fairlawn, New Jersey. Pollak testified that he was to get a return of 25% per annum on his Fairlawn investment but that he did not ever receive the return of his $4,400 nor any money in regard to that investment. His next transaction with Malakoff involved a deal in Scranton in which he gave Malakoff $300. This money was never returned to him.

On the same day as the Scranton deal in March 1953, Pollak claims he gave Malakoff $375 on a proposition in

Waverly Place, New York, and on March 26 gave Malakoff an additional $250 on this proposition. This money was never returned to Pollak. Pollak also testified that on May 17, 1953 he lent Malakoff $5,000 which was never returned to him. Pollak produced a check for $5,000 of John Malakoff, Agent dated May 17, 1953 but this was returned unpaid for insufficient funds.

[fol. 149] In connection with Nazareth, Pollak says he received about two checks each in the sum of $150. There were put in evidence two checks of John Malakoff payable to Ernest Pollak each for $150, one dated May 1, 1953 and the other April 1, 1953. These checks undoubtedly represented so-called dividend payments on an investment by Pollak in Nazareth. Each check is 1/12th of annual interest at the rate of 20% per annum on $9,000. The Siegel, Berg report shows that a check for $150 dated February 2, 1953 was given to Ernest Pollak and that a check for the same amount was given to him on March 2, 1953. These checks were made by Nazareth and drawn upon the Second National Bank of Nazareth, Pennsylvania. Thus Pollak received a total of $600 in so-called dividends and not just two checks for $150 each as testified to by Pollak.

Pollak further testified that Malakoff gave him a check for $750 on March 19, 1953 to repay the amount invested by him on the Scranton contract and that Pollak never deposited this check and never received the amount thereof from Malakoff. This check was received in evidence and it shows that it was never presented for payment. Pollak also testified that he mailed a check for $300 to Malakoff on July 1, 1954 and this sum was never returned to him. This mailing was subsequent to the date of the filing of the reorganization petition. According to a paper which purported to be a copy of the covering letter which was sent by Pollak to Malakoff, if the $300 was for Malakoff's personal needs he was to forget about profits and if it was for business then Pollak wished him much luck.

[fol. 150] Pollak assigned his stock to Robert H. Davidson in October 1957 but that assignment is irrelevant to the inquiry into the validity of the stock certificate.

There is only one serious question in issue in connection with Pollak's investment in Nazareth and that is whether

he actually gave Malakoff $1500 in cash in addition to $7500 in checks. The debtor states that the question of fact to be determined is whether Pollak actually gave $1500 in cash. Supporting Pollak's testimony in this regard is the fact that Malakoff, commencing on February 1, 1953 and for three months thereafter, each month paid Pollak dividends based upon a $9,000 investment. It is, of course, possible but most unlikely that in this case Malakoff would have paid dividends based on $9,000 when he had only received $7,500 from Pollak. The record clearly indicates that Malakoff owed Pollak money in connnection with other deals and it seems likely that Malakoff satisfied a personal indebtedness of $1500 to Pollak by applying it to the purchase of Nazareth stock. The fact that Certificate No. 31 was issued for 9 shares when Malakoff was selling shares at $1,000 per share also tends to support an investment of $9,000 by Pollak in Nazareth, despite the fact that in some cases Malakoff issued stock based upon a lesser amount per share. On all the evidence it may fairly be said that Pollak paid $9,000 in consideration for the issuance to him of Stock Certificate No. 31. It might also be added that there is nothing on the certificate or on the stub thereof which indicates that the stock was issued subject to any conditions, qualifications or limitations.

[fol. 151] The sum invested in Nazareth by Pollak is $9,000. The amount returned to him in so-called dividends is $600. Accordingly, the sum of $8,400 constitutes the net fair value of Ernest Pollak's investment in Nazareth.

58. Claim No. 42 for 8 shares of Nazareth stock was filed by *H. Lawrence Laupheimer* based on Certificate No. 23 dated the 2nd day of February 1953. The stated consideration for the said stock is as follows. Check for $4,500 dated October 18, 1951 and $500.00 in cash and $3,000 by transfer to Malakoff of an interest to that extent of claim in the Locust Street Properties in Philadelphia. Power of attorney was executed in blank.

Objections to the allowance of Laupheimer's Stock Claim No. 42 were filed by the debtor and by the Margolis group. The debtor's objections charge that Malakoff did not own stock issued to claimant and that no consideration passed to the debtor. The debtor also in the alternative asked for

an affirmative judgment for $8,000, the unpaid subscription price. The objections of the Malakoff group attempted to incorporate as objections to Laupheimer's claim objections the debtor had filed to the allowance of the stock claims of the Margolis group. In addition, the Margolis objections charged that claimant was not entitled to a credit of $3,000 on the Locust Street Properties; that only $4,500 was paid by claimant for 8 shares of stock and that the 8 shares of stock represented stock in excess of authorized common stock. Notice of a hearing on the said objections was given by Examiner to claimant, to Rose Laupheimer and to the attorney for the debtor and to the attorney for the Margolis group.

[fol. 152] Claimant testified that his first business with Malakoff was for a one-eighth interest in the Locust Street Properties for which he gave Malakoff a check for $2,750 on February 6, 1951. After this investment, Laupheimer claims that he had various discussions with Malakoff about investments and that Malakoff mentioned the Nazareth market as a prime investment. These discussions were held in the home of Malakoff's daughter, Mrs. Harold Plevin. Malakoff showed Laupheimer pictures of the market and told him that it was paying 20% per annum interest and that he hoped it would eventually pay 25%.

According to claimant, as a result of his conversations with Malakoff, he bought five shares in Nazareth for his mother, Rose Laupheimer, at $1,000 per share. Claimant gave Malakoff a check for $4,500 dated October 18, 1951. This check was endorsed John Malakoff, John Malakoff, Agent and was deposited in a Malakoff Agent account in the Corn Exchange Bank Trust Company. Laupheimer received a receipt from Malakoff for the $5,000 dated September 18, 1951. This receipt not only referred to an investment of $5,000 but to 5 shares and to 1/40th of the deal.

Malakoff told Laupheimer that he was the sole agent of the market and could transact all of the business for the market and, so Laupheimer said, impressed Laupheimer with the fact that Malakoff himself was managing the market. On October 18, 1951, Laupheimer also gave Malakoff $500 in cash, and this was done pursuant to Malakoff's request.

[fol. 153] When the check and cash were given to Malakoff, Malakoff said that he hoped to get the stock certificate out very shortly. Laupheimer did not get a separate receipt for the $500 in cash.

In the Fall of 1952, Malakoff again mentioned the Nazareth market to Laupheimer. He suggested that Laupheimer should obtain more shares for his mother because they were a prime investment and had tremendous growth factors. Laupheimer stated that he did not have any money for additional investment in Nazareth and Malakoff said that he might be able to sell the Locust Street Properties. Malakoff offered to give Laupheimer three shares of stock in Nazareth in exchange for Laupheimer's interest of $2750 in the Locust Street Properties and Laupheimer agreed to that transaction. The parties shook hands on the deal.

Laupheimer produced a report of Plavin & Lippel, accountants, on the Locust Street Properties dated January 31, 1953 and addressed to M. S. Sternberg, Esq. This report indicates that Locust Properties Inc. was liquidated on August 18, 1952 and that the stockholders relinquished their stock in exchange for the assets of the corporation, subject to the liabilities thereof. This report shows that the operation of 1415 Locust Street, Philadelphia, Pennsylvania, was continued in the form of a partnership known as Locust Properties, in care of M. Sternberg, 370 Lexington Avenue, New York, New York, until October 23, 1952 when the property was sold. The report also states that M. Laupheimer had an interest of 12½% in the venture. In addition, claimant produced copy of a letter dated Febru-
[fol. 154] ary 5, 1951, addressed to Malakoff and enclosing check for $2,750 to cover the cost of a one-eighth interest in the Locust Street venture, which interest was to be in the name of Mayme H. Laupheimer.

There is nothing in the report dated January 31, 1953 to indicate that the one-eighth interest of M. Laupheimer in the Locust Street venture had theretofore been transferred to Malakoff in exchange for Nazareth stock or otherwise. However, attached to Stock Claim No. 42 is photostatic copy of an alleged letter dated December 12, 1952 from claimant to Malakoff stating that when Malakoff got check for $3000 from the sale of "our interest" in the Locust

Street venture, Malakoff should invest this money for claimant's mother in Nazareth. This letter also recited that Malakoff had theretofore received $500 in cash and claimant's personal check for $4,500. The forthcoming check for $3,000 plus the moneys previously given to Malakoff, so the letter stated, entitled claimant's mother to 8 shares in Nazareth. Neither the original nor the carbon copy of the letter of December 12, 1952 was produced by claimant. Also attached to Stock Claim No. 42 is photostatic copy of a letter dated February 3, 1953 from M. S. Sternberg, Esq. to Mayme H. Laupheimer. This letter stated that Mayme Laupheimer had received a distribution of $3,000 on account of her share of the proceeds of the sale of the Locust Street Properties. Also produced was a photostatic copy of a check of the Commonwealth Title Company of Philadelphia for $19,055.50 payable to Mayme H. Laupheimer and others and representing the proceeds of 1415 Locust Street, Philadelphia. This check bears the endorse-
[fol. 155] ment of Mayme Laupheimer as well as of the other payees and the endorsement of John Malakoff, Special. Thus it seems clear that Malakoff received the $2,750 which claimant had invested in the Locust Street Properties in the name of Mayme Laupheimer. Laupheimer testified that his wife did not endorse this check but that seems to be unimportant since he said that he had agreed to invest the $2,750 from the Locust Street Properties in Nazareth.

Claimant testified that he received income on the moneys he advanced to Malakoff. He received dividends or interest on the Locust Street venture and he received 20% on his investment in the Nazareth market until the time that later checks were returned unpaid.

Rose Laupheimer received a check for $27.77 of John Malakoff, Agent on November 1, 1951. There is nothing on this check to indicate that it was related to the Nazareth venture, although that is the testimony of Laupheimer. This check undoubtedly represented a dividend return on $5,000 for about one-third of a month on the basis of 20% per annum. Between December 1951 and September 1952 each month Rose Laupheimer received a check for $83.33 of John Malakoff, Agent or John Malakoff, Special. Each

check represented one-twelfth annual interest at 20% per annum on $5,000 and corroborates claimant's testimony that during that period he had an investment of $5,000 in Nazareth with Malakoff. In October, November and December 1952 and January 1953 each month a check of John Malakoff, Special for $133.34 was issued to R. Laupheimer. These checks as were the earlier checks, were drawn upon the Corn Exchange Bank Trust Company. Each check is [fol. 156] 1/12th of annual interest at the rate of 20% per annum on $8,000. A check for $133.34 was issued to R. Laupheimer on February 2, 1953 and a check for the same amount was issued to her on March 2, 1953 by Nazareth. These checks were drawn upon the Nazareth account in the Second National Bank of Nazareth, Pennsylvania. A check for $133.34 dated April 1, 1953 and payable to R. Laupheimer signed by John Malakoff and drawn upon the Manufacturers Trust Company was undoubtedly received by claimant. Claimant produced a check dated May 1, 1953 for $133.34 payable to R. Laupheimer which claimant testified was returned unpaid. Therefore the total in dividends received by claimant (or Rose Laupheimer) was $1,794.45.

According to Laupheimer, some time in March 1952 Malakoff called him to his office and discussed with him a project in Houston, Texas. As a result of this conversation and on March 26, 1952, Laupheimer gave Malakoff two checks, one for $1,000 drawn on the Manufacturers Trust Company, New York, and the other for $2,000 drawn on the Sedalia Bank and Trust Company, Sedalia, Missouri. Both checks were endorsed John Malakoff, John Malakoff, Agent, and were deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Malakoff gave Laupheimer a promissory note for $3,000 payable on demand, which was never paid.

Thereafter, Malakoff went to Texas and on his return told Laupheimer that the Houston, Texas, proposition had not panned out and that he would invest Laupheimer's $3,000 in another project. Laupheimer requested Malakoff to give him three shares in Nazareth for his money but [fol. 157] Malakoff told him that no more Nazareth shares were available. He did say that as soon as the shares became available he would buy them for Laupheimer and that

in the meantime he would invest Laupheimer's money in the Hotel Margaret in Brooklyn, New York. Laupheimer evidently acquiesced in the investment of the $3,000 in the Hotel Margaret. He did not receive from Malakoff any receipt other than the note heretofore mentioned nor did he get any form of memorandum reflecting the purported investment in the Hotel Margaret. Laupheimer did get from Malakoff a series of $50 checks which ran from May 1952 through April 1953 and which purported to represent dividends at the rate of 20% per annum on an investment of $3,000 in the Hotel Margaret.

Laupheimer testified that Malakoff did not tell him that he was selling his own stock in Nazareth to Laupheimer. He claims that Malakoff told him that he owned none of the properties which he managed but acted only as agent for the properties. He did not recall ever having received any checks drawn by the Nazareth market but it is clear that he did receive Nazareth checks for the February and March 1953 dividends on his $8,000 investment. Laupheimer admitted that Malakoff did not tell him that a corporation owned the market and he did not remember whether the word corporation was mentioned at all. Malakoff made reference to stock although not necessarily in connection with a particular corporation by saying that there was 200 shares of stock issued for the Farmers Market and that Laupheimer was buying five shares. Malakoff did tell Laupheimer that he controlled the corporation.

[fol. 158] Stock Certificate No. 23 is regular on its face. The stub for that certificate, however, contains the following legend: "Transfer to *Ambass* out". This legend would seem to indicate that Laupheimer's investment in Nazareth was transferred to Ambassador Estates and that the stock should therefore be excluded. Nevertheless, there is no clear evidence in the record which would support the inference that Laupheimer's investment in Nazareth was transferred to Ambassador Estates and he is entitled to have any doubts resolved in his favor. It may be noted that Mayme Laupheimer, whose name has been mentioned above, is the wife of H. Lawrence Laupheimer. The fact that Malakoff paid dividends to R. Laupheimer, the mother of claimant through April 1953 on $8,000 indicates that at

least as late as April 1953 Malakoff regarded the $8,000 as still invested in Nazareth.

Malakoff considered that Laupheimer had invested $8,000 with him in the Nazareth venture. Malakoff paid so-called dividends based on such an investment. Claimant does not contend that he invested more than $7,750 in Nazareth. It appears that Malakoff was willing to pay dividends on the additional $250 in order to be permitted to retain $2,750 invested by Laupheimer in Locust Street Properties. Therefore the actual investment by Laupheimer was $7,750 against which he received a total of $1,794.45 in so-called dividends. Accordingly, the sum of $5,955.55 constitutes the net fair value of the investment made by H. Lawrence Laupheimer in Nazareth.

[fol. 159] 59. Claim No. 11 for 7 shares of Nazareth stock was filed by *Arnold A. Weinstein*. This claim is based on Certificate No. 18 dated the 2nd day of February 1953. The stated consideration for the said stock is check for $7,000 dated September 19, 1951 payable to the order of John Malakoff. Claimant also asserts an alternative claim for $7,000 as a general creditor on the following theory:

"That John Malakoff, the then President of the Debtor, and as such, fraudulently represented to Claimant on or about the 12th day of September 1951, that he was the President of the Debtor Corporation, that the said Corporation was authorized to issue Two hundred (200) shares of stock, that said stock was duly issued to him and that 7 of such shares were being sold to Claimant for $7,000.00. On the basis of the foregoing representations, deponent issued his check to John Malakoff as above stated on or about the 19th day of September 1951 which check was earmarked on the reverse side thereof for Nazareth Farmers Market (see attached photostat). In the event that the Court finds that Claimant is not a legal stockholder of the Debtor for 7 shares of its capital stock then, and in that event, and in the alternative, Claimant's claim is asserted as that of a general creditor against the Debtor for damages in the sum of $7,000.00 as a result of the fraudulent misrepresentations made by John Malakoff, as President of the Debtor Corporation, in reliance upon which Claimant

paid the sum of $7,000.00 for the purchase of the aforesaid stock. The Debtor by its conduct, having allowed and permitted its President, John Malakoff, to conduct the affairs of the Corporation, including this transaction, in such manner that it is and should be estopped from denying re-
[fol. 160] sponsibility or the authority of John Malakoff, its then President."

No attorney in fact was designated in the proof of stock claim.

Objections to the allowance of Weinstein's Stock Claim No. 11 were filed by the debtor by H. Lawrence Laupheimer, Secretary, and were subscribed by Alex L. Rosen, attorney for the debtor. These objections were sworn to on the 5th day of November 1957. The objections charge that Malakoff did not own the stock certificates which were delivered to claimant and that no consideration passed to the debtor. The debtor set up a counterclaim for $7,000, the unpaid subscription price. Objections to the allowance of Stock Claim No. 11 were also filed by the Margolis group. One objection attempted to incorporate as an objection to the Weinstein stock claim objections filed by the debtor to the allowance of the stock claims of the Margolis group. In another objection, it was charged that the seven shares of stock sold to Weinstein were part of an excess over the authorized 200 shares of capital stock. In a third objection, it was alleged that in September 1951, Weinstein acted as attorney for Malakoff that as such attorney he prepared a letter in behalf of Malakoff, which was sent to the investors informing them in effect that Malakoff (a) had acquired all the stock of the debtor, (b) would decide whether Nazareth would be operated as a corporation, a joint venture or a limited partnership, (c) would determine as to the sale of the debtor's business and the terms thereof, (d) had declared dividends at the rate of 20% annually, [fol. 161] and (e) had acknowledged the amount of money paid by the investor and the number of shares that would be issued, etc. It was further alleged that dividends at the rate of 20% per annum were paid monthly beginning in September 1951 with the last payment in May 1953 or thereabouts; that Weinstein had received nineteen pay-

ments aggregating $2,216.54; that one Helen Bernstein had been instrumental in causing Weinstein to invest in Nazareth; that Weinstein on one or two occasions had acted as attorney for Helen Bernstein; that Helen Bernstein had been instrumental in selling a total of 66 shares of Nazareth stock for Malakoff; that Helen Bernstein received $400 for each share sold or a total of $26,000; that she had received $2,800 for inducing Weinstein to invest $7,000 with Malakoff for an interest in Nazareth; that Weinstein on behalf of the debtor in objections filed to the claims of various stockholders had urged that Malakoff had no right to issue stock or, in effect, had no authority to accept money for the sale of stock in Nazareth; and that if the debtor's objections to the claims of other stockholders were upheld and Weinstein's claim as a general creditor for $7,000 was allowed, there should be a set-off and counterclaim in favor of the debtor of $5,016.54 representing the sum of $2,216.54 paid by Malakoff to Weinstein as dividends and $2,800 paid to Helen Bernstein as commissions.

Objections to the allowance of the Weinstein stock claim were also made by the Margolis group on other grounds. Stock claimant Weinstein filed a reply to the counterclaims of the debtor and the Margolis group on or about the 12th day of May 1958. Notice of a hearing on the said objections was given to the stock claimant and to the attorney for the debtor and to the attorney for the Margolis group by the examiner.

[fol. 162] Claimant testified that he met Malakoff for the first time in the latter part of August or possibly early in September 1951. This meeting with Malakoff resulted from a conversation claimant had with his father-in-law, Bernhard S. Gottlieb, who indicated to him that Malakoff was engaged in a venture which might be remunerative. Weinstein called Malakoff and made an appointment to meet him. On the telephone he talked to Malakoff about an opportunity to view the Nazareth market in Pennsylvania. Weinstein met Malakoff in his car and also met Helen Bernstein, to whom he had been introduced on an earlier occasion. They drove to Nazareth.

Malakoff told Weinstein that the price for an interest in the market was $1,000 per share. He said that he did not know whether he was going to operate the market as a limited partnership or a corporation. Malakoff told Weinstein that he had sold some interest in the market to some people who had asked for receipts, and he asked Weinstein to draft a receipt for him that he could use in connection with his solicitation of investors. Weinstein agreed to this undertaking.

About a week after visiting Nazareth, Weinstein drafted a receipt from Malakoff and sent the original copy of a draft to Malakoff. This draft was dated September 14, 1951 and provided substantially as follows:

(1) acknowledged receipt of a check "In the Matter of Nazareth and Farmers Auction Market at Nazareth, Pennsylvania".

(2) stated the understanding of the parties to be "that all of the authorized stock of the Nazareth Farmers and Auction Market Inc., which owns the market, has been issued to me (Malakoff)".

[fol. 163] (3) stated that Malakoff was obligated to the addressee of the letter for a proportionate share of his earnings, dividends, liquidating or otherwise, and profits from the market as Malakoff received them.

(4) stated that dividends had been declared at the rate of 20% per annum and it was expected that dividends at the same rate would be paid on the first day of each month.

(5) stated that Malakoff might cause to be issued to the addressee a specified number of shares of his "present stockholdings" and that Malakoff might cause the dissolution of the corporation and the formation of a limited partnership in which the addressee would be a limited partner and the specified amount invested would be applied as the addressee's contribution "with a corresponding proportionate interest".

(6) the method of operation was to remain solely in Malakoff's hands.

(7) the sale of the market by Malakoff, entirely within the discretion of Malakoff, if made, was ratified by the addressee, provided a majority in interest of the stockholders approved the sale or the sale was authorized and approved by the general partner or partners.

(8) Malakoff agreed to pay the addressee the specified amount invested should the addressee at any time desire to liquidate the rights evidenced by the letter.

Some few days after sending Malakoff the draft, Weinstein received a telephone call from Malakoff. In that telephone call, Weinstein was asked whether he was prepared to make an investment in the venture and he replied that he was ready to invest $7,000. Weinstein then issued a check to the order of Malakoff for $7,000 and forwarded the same to him.

[fol. 164] Claimant produced a check for $7,000 payable to Malakoff dated September 19, 1951. This check was endorsed John Malakoff, John Malakoff, Agent and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Over the endorsement of Malakoff appears the legend "Re Nazareth Farmers Mkt.". Weinstein testified that the legend was placed on the check by him before the check was forwarded to Malakoff.

According to Weinstein, he did not receive an immediate acknowledgment from Malakoff regarding his investment but on the first of subsequent months he did get checks signed by Malakoff Agent and in some instances Malakoff Special, representing a return on the investment. Commencing with November 1951 and through January 1953, Weinstein each month received a check of John Malakoff, Agent or John Malakoff, Special in the sum of $116.66. These checks represented so-called dividends upon Weinstein's investment of $7,000 in Nazareth at the rate of 20% per annum. Weinstein also received a Nazareth check on the Second National Bank of Nazareth dated February 2, 1953 for $116.66 and a check for the same amount on the same account dated March 2, 1953. In addition, he received a check dated April 1, 1953 of John Malakoff drawn on the Manufacturers Trust Company for $116.66 and an-

other Malakoff check drawn on the same bank for the same amount dated May 1, 1953.

Four or five months after the investment was made by Weinstein, he had a conversation with Malakoff at which time he requested some acknowledgment or receipt concerning the $7,000. Weinstein testified that Malakoff in- [fol. 165] formed him that he would forward a receipt and subsequently Weinstein received a letter receipt from Malakoff dated September 14, 1951. This letter covered the receipt of $7,000 from Weinstein and was substantially in the form of the draft prepared by Weinstein except that it did not give Weinstein the option of liquidating his rights as evidenced by the letter so as to require the return to him of the $7,000 invested by him with Malakoff in the Nazareth venture.

Weinstein testified that he received the letter receipt in January or February 1952. On or about the 2nd or 3rd day of February 1953 Weinstein received Stock Certificate No. 18 for 7 shares. The stock certificate is regular on its face except that it bears the following legend "Subject to letter of agreement with John Malakoff." The stub for Certificate No. 18 is regular on its face and there is nothing thereon to indicate that it was subject to any conditions or qualifications.

Weinstein continued to receive dividends on his investment in Nazareth subsequent to the receipt of the stock certificate. These dividends continued until some trouble with Malakoff arose around May 1953. As a result of this trouble, Malakoff resigned as President of the corporation and Charles Kanter, Benjamin Margolis and Weinstein were elected directors.

Weinstein testified that he had not done any business with Mrs. Bernstein or Malakoff, whether by way of exchanges, loans, advances or transactions of any kind or nature, other than drafting the original letter receipt mentioned above. When he drove to Nazareth with Malakoff, [fol. 166] Weinstein formed the impression that Malakoff was acting as an agent and was promoting the Nazareth deal. This was so despite the fact that the draft prepared by Weinstein stated that all of the authorized stock had been issued to Malakoff. The name of the corporation in-

corporated by Weinstein in the letter receipt was given to him by Malakoff on their trip to Nazareth. Weinstein did not write the name down and incorporated the name in the draft from memory.

Weinstein's impression was that he was buying into a venture and at that time it wasn't understood whether the venture would be an existing corporation, a new corporation or a limited partnership. Weinstein admitted that he never made out a check to Nazareth and that he never paid any consideration directly to Nazareth. Weinstein received $75 for preparing the draft of the letter receipt. Weinstein did not do any work for Malakoff, Nazareth or any other firm connected with Malakoff or Helen Bernstein other than the transaction mentioned above. He emphasized this fact.

It is perfectly plain that Weinstein gave Malakoff $7,000 for the purpose of acquiring Nazareth stock. There is nothing in the record to support the charge that Helen Bernstein received the sum of $2800 for inducing Weinstein to invest $7,000 with Malakoff for an interest in Nazareth. Furthermore, if such a commission was paid to Helen Bernstein by Malakoff, the record is barren of any proof that Weinstein had the slightest knowledge of that fact. Weinstein dealt with Malakoff and presumably was [fol. 167] willing to rely upon Malakoff. He invested $7,000 in Nazareth stock and the sum of $2,216.54 was returned to him by way of so-called dividends. Accordingly, the sum of $4,783.46 constitutes the net fair value of the investment of Arnold Weinstein in Nazareth.

60. Claim No. 41 for 3 shares of Nazareth stock was filed by *Aaron Fried*. This claim is based on Stock Certificate No. 25 dated the 2nd day of February 1953. No consideration is set forth in the proof of claim which therefore fails to satisfy Section 57a of the Bankruptcy Act and Official Form No. 28. Power of attorney runs to Meyer Kraushaar, Esq. 42 Broadway, New York 4, New York.

Objections to the allowance of Stock Claim No. 41 of Aaron Fried were filed by the debtor and by the Margolis group. The debtor's objections were based on lack of title

in Malakoff and no consideration passing to Nazareth, and also contained a counterclaim for $3,000, the unpaid subscription price. The Margolis objections, among other things, pointed up the fact that claimant had failed to prove the payment of $2,000 to Malakoff.

Jerome Fried, the manager of the Nazareth market, acted for his father in the acquisition by his father of three shares of Nazareth stock. Aaron Fried gave his son Jerome a check dated December 7, 1951 to deliver to John Malakoff. Claimant produced photostatic copy of a check dated December 7, 1951 of Aaron Fried for $1,000 payable to John Malakoff. This check was endorsed John Malakoff, John Malakoff, Agt. and was deposited in the Corn Exchange [fol. 168] Bank Trust Company in the Malakoff Agent account. Over the endorsement of John Malakoff appears the legend "1/200 share of Nazareth Farmers Market Pa." The legend is in the handwriting of Jerome Fried. Jerome Fried has no recollection of the time or place when he gave the check to Malakoff. The check itself shows that it was deposited on or about December 10, 1951 and of course it reached Malakoff since it was deposited in his Agent account.

Claimant also produced through Jerome Fried two additional checks of Aaron Fried payable to the order of John Malakoff. One check was dated January 7, 1952 and was for $1,000 and the other was dated October 20, 1952 and was for $2,000. The $1,000 check was payable to John Malakoff and was endorsed John Malakoff, John Malakoff Agt. and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company on or about January 9, 1952. The following legend appears over the endorsements "For 1/200 share of Nazareth Farmers Market." The $2,000 check was payable to John Malakoff Agent and was endorsed John Malakoff Agent and deposited in the same account. Over the endorsement appears the following legend "1000—Loan, 1000—1/200 shares of Nazareth."

Jerome Fried testified that the legend over the endorsement on the $2,000 check was placed thereon by him. Malakoff told Fried that the investment would pay 20% and Fried in turn told this to his father.

A check for $16.67 of John Malakoff Agent was issued to Aaron Fried on January 2, 1952 and was drawn upon the Corn Exchange Bank Trust Company. This check pre-

[fol. 169] sumably represented interest on $1,000 at 20% per annum for December 1951. In February, March, April, May, June, July, August, September, October and November 1952, each month, Aaron Fried received a check for $33.34 of John Malakoff, Special, drawn on the Corn Exchange Bank Trust Company. These checks represented monthly interest on $2,000 at the rate of 20% per annum. In December 1952 and January 1953 claimant received a check for $50 each month of John Malakoff, Special drawn on the Corn Exchange Bank Trust Company. Each check represented interest at the rate of 20% per annum on $3,000. Claimant also received a check for $50 on February 2 and a check for the same amount on March 2, 1953, both checks being drawn by Nazareth upon the Second National Bank of Nazareth, Pennsylvania. In addition, claimant received a check for $50 of John Malakoff dated April 1, 1953 and drawn upon the Manufacturers Trust Company. These so-called dividend checks support the investment totalling $3,000 claimed to have been made by Aaron Fried in Nazareth stock. Besides, claimant received a check of John Malakoff for $83.34 dated May 1, 1953 and drawn upon the Manufacturers Trust Company. This check seems to have represented further dividends upon the Nazareth investment.

A number of checks of John Malakoff Agent drawn to the order of Aaron Fried, claimant herein, were received in evidence. Jerome Fried testified that these checks were part of exchanges or short term loans. He also testified that [fol. 170] occasionally his father would obtain a small profit on an exchange with Malakoff. According to Jerome Fried at no time did his father engage in any real estate deals with Malakoff, except with respect to Nazareth. He could not explain an entry in a check book which referred to an evident participation of Aaron Fried to the extent of $2,000 in certain property known as 69th Road. Jerome Fried was positive that neither he nor his father made any investment with Malakoff in the Hotel Margaret and that he did not get any dividends from the Hotel Margaret.

Stock Certificate No. 25 is regular on its face. The stub for that certificate is regular except that the word "out" appears thereon. There is nothing in the record to indicate

what this word "out" means and any doubts should be resolved in favor of claimant.

It is true, as the debtor contends, that the testimony of Jerome Fried in regard to his father's transactions with Malakoff is contradictory. However, there is no evidence of fraud or diversion of assets of Nazareth which can be imputed to Aaron Fried. There is insufficient proof in the record to establish that Aaron Fried received in return from Malakoff substantially more than he advanced to Malakoff, apart from the Nazareth transaction. Aaron Fried seems to have made an investment of $3,000 in Nazareth. The sum of $683.41 was returned to him by way of so-called dividends. Accordingly, the sum of $2,316.59 constitutes the net fair value of Aaron Fried's investment in Nazareth.

[fol. 171] 61. Claim No. 31 for one share of Nazareth stock was filed by *George Bond.* This claim is based on Certificate No. 48 dated the 2nd day of March 1953. The stated consideration for the said stock is check of Jeanne R. Bond to the order of George H. Bond for $1,000 dated February 27, 1953 and endorsed to the order of John Malakoff. Power of attorney runs to Bernard Buchwald, Esq.

Objections to the allowance of Stock Claim No. 31 of George Bond were filed by the debtor and the Margolis group. The debtor's objections were that Malakoff had no title to the stock issued to claimant and that no consideration passed to Nazareth. The debtor set up a counterclaim for $1,000, the unpaid subscription price. The Margolis objections were based largely upon the fact that the certificate issued to claimant represented stock in excess of the authorized issue of 200 shares. Notice of a hearing on the said objections was given by the Examiner to claimant, the attorney for the debtor and the attorney for the Margolis group. No notice was given to Bernard Buchwald, Esq. but the claimant appeared in person at the hearing on objections and offered no objection to the lack of notice to his designated attorney in fact.

Claimant testified that he learned of Nazareth through some of his friends among whom was Harold Masur. Masur was the intermediary for Bond's acquisition of the stock

and Bond gave the check for the stock to Masur. Claimant produced photostatic copy of check of Jeanne R. Bond for $1,000 payable to George H. Bond dated February 27, 1953 [fol. 172] and drawn upon the Chase National Bank. This check was endorsed as follows: "one—pay to the order of John Malakoff one share of Nazareth Farmers Market George H. Bond, John Malakoff ok for *cash* M S Sternberg."

Jeanne R. Bond is George Bond's sister. After the check was given to Malakoff claimant received Stock Certificate No. 48 for one share of Nazareth stock. This certificate is regular on its face but has the following typewritten endorsement: "This stock pays twenty per cent per annum, payable in equal monthly payments on the first day of each month." The stub for Certificate No. 48 is also regular on its face and contains no qualifications or conditions whatsoever.

Claimant received from Malakoff a check for $16.67 dated April 1, 1953 drawn upon the Manufacturers Trust Company and a check for the same amount dated May 1, 1953 drawn upon the same bank. Each check represented so-called monthly dividends on $1,000 invested in Nazareth at the rate of 20% per annum.

Claimant had another transaction with Malakoff involving the purchase of stock in the Hotel Margaret. This investment must have been made early in 1952 since claimant received dividend checks from Malakoff on that investment during the major portion of 1952 and the early part of 1953.

George Bond invested $1,000 in Nazareth through Malakoff. The sum of $33.34 was returned to him. Accordingly, the sum of $966.66 constitutes the net fair value of George Bond's investment in Nazareth.

[fol. 173] 62. Claim No. 32 for 3 shares of Nazareth stock was filed by *Tess J. Schwartz*. This claim is based upon Certificate No. 60 dated the 20th day of March 1953. The stated consideration for this stock is a check for $3,000 dated March 17, 1953 endorsed over to Malakoff. Power of attorney runs to Bernard Buchwald, Esq.

Objections to the allowance of the stock claim No. 32 of Tess Schwartz were filed by the debtor and the Margolis

group. The debtor's objections are similar to those urged against the allowance of the claim of George Bond. The objections of the Margolis group were also substantially the same as those advanced to the allowance of the Bond stock claim. Claimant filed a paper characterized as "Answer of Tess J. Schwartz to objections to creditors claim." Notice of a hearing on the said objections was given to claimant, the attorney for the debtor and the attorney for the Margolis group. No notice was given to Bernard Buchwald, Esq. Claimant appeared at the hearing on her stock claim and offered no objection to the lack of notice to her designated attorney in fact.

Claimant testified that she bought three shares of Nazareth stock in March 1953. She said her brother and her mother both had stock and she decided that she would have some too. She was living in Florida at the time and sent a check to her brother, Harold Schwartz, with the request that he purchase three shares for her. She talked to no one about the stock purchased other than members of her family.

[fol. 174] Claimant produced check for $3,000 made by Tess J. Schwartz to the order of H. B. Schwartz dated March 17, 1953 and drawn upon the Florida National Bank and Trust Company at Miami, Florida. This check bears the following endorsements: "For 3 shares of Farmers Market Harold B. Schwartz, H. B. Schwartz, John Malakoff, Benjamin Margolis."

Claimant also produced a letter from Malakoff to Harold B. Schwartz acknowledging receipt of check for $3,000 for 3 shares of Nazareth stock for his sister, Tess J. Schwartz. Stock Certificate No. 60 was also enclosed in that letter. This certificate is regular on its face but has the following endorsement: "This certificate represents three $1,000. shares ($3,000.). It is guaranteed to pay a minimum return of twenty (20%) per cent per annum in equal monthly payments on the first day of each month. John Malakoff." The stub for Certificate No. 60 is also regular on its face and has no qualifications or conditions whatsoever.

Claimant received one so-called dividend check for $50. Claimant testified that she received only this one so-called dividend check from Malakoff, which was returned. She

produced a check dated June 4, 1953 of John Malakoff for $50 payable to her order and drawn upon the Industrial Bank of Commerce of New York. This check was returned for insufficient funds. The amount of this check represents the June dividend on a $3,000 investment at the rate of 20% per annum. Since claimant gave Malakoff $3,000 in March, she should have received a $50 dividend check on or about May 1. However, there is no evidence to sup-
[fol. 175] port a finding that she actually received $50 in May so her testimony that she received only one dividend check which was returned cannot be refuted.

Concededly claimant gave Malakoff $3,000 for an investment in Nazareth. She did not know Malakoff nor did she ever meet him. No part of the $3,000 was returned to claimant. Therefore the sum of $3,000 constitutes the net fair value of claimant's investment in Nazareth.

63. Claim No. 24 for 2 shares of Nazareth stock was filed by *Cydney Grosman*. This claim is based upon Certificate No. 61 dated the 25th day of March 1953. The stated consideration for this stock is claimant's check for $2,000 to Malakoff dated March 25, 1953. Power of attorney runs to Bernard Buchwald, Esq.

The debtor and the Margolis group both filed objections to the allowance of Stock Claim No. 24 substantially upon the same grounds as the objections filed to the allowance of the claim of George Bond. Notice of a hearing on the objections was given by the Examiner to claimant, the attorney for the debtor and the attorney for the Margolis group. No notice was given to Bernard Buchwald, Esq. but claimant appeared at the hearing and did not object to such lack of notice.

Claimant was introduced to Malakoff by Helen Bernstein and Harold Masur on March 25, 1953. Claimant talked to Malakoff about the purchase of Nazareth stock and gave Malakoff a check for $2,000 dated March 25, 1953 drawn upon the Manufacturers Trust Company. The check [fol. 176] bears the following endorsement: "2 shares of Nazareth Farmers Market John Malakoff, John Malakoff, Special." This check was deposited in the Malakoff Special account in the Corn Exchange Bank Trust Company. In

return for the check, claimant received Stock Certificate No. 61.

Stock Certificate No. 61 is regular on its face but has the following endorsement: "This certificate represents two $1,000. shares ($2,000.). It is guaranteed to pay a minimum dividend of twenty (20%) per cent per annum in equal monthly payments on the first day of each and every month. John Malakoff." There is nothing on the stub for Stock Certificate No. 61 to indicate that it was issued subject to any conditions or qualifications.

Claimant did not receive any memorandum from Malakoff at the time he received Stock Certificate No. 61. Claimant knew Helen Bernstein prior to March 1953 but did not know Malakoff. Helen Bernstein told him that Nazareth was a good investment and that he would get 20% a year on his money. Claimant did not have any previous dealings of any kind with Malakoff.

Subsequent to March 25, 1953 claimant did not have any transactions with Malakoff aside from the income he received in connection with Nazareth. He received a dividend check for $5.55 in April 1953, a dividend check for $33.33 in May 1953 and a dividend check for $33.34 in June 1953. He therefore received a total of $72.22.

[fol. 177] Claimant paid no money directly to Nazareth. Nevertheless claimant in good faith gave Malakoff $2,000 for investment in Nazareth. The sum of $72.22 was returned to him. Accordingly, the sum of $1,927.78 constitutes the net fair value of Cydney Grosman's investment in Nazareth.

64. Claim No. 37 for one share of Nazareth stock was filed by *Rose Kaplan*. This claim is based upon Stock Certificate No. 40 dated the 2nd day of February 1953. The stated consideration for this stock is $1,000. No attorney in fact is designated in the claim.

The debtor filed objections to the allowance of Stock Claim No. 37 of Rose Kaplan. These objections were based upon no title in Malakoff and no consideration to the corporation and included a counterclaim for $1,000, the unpaid subscription price. Notice of a hearing on said objection was given by the Examiner to the claimant and the attorney for the debtor.

Claimant met Malakoff at the home of Gertrude Klein. This was prior to February 17, 1953. Malakoff suggested to claimant's husband that he buy Nazareth stock.

Thereafter, Rose Kaplan mailed her check for $1,000 to John Malakoff. This check was drawn upon the County Trust Company of Mount Vernon, New York, was dated February 17, 1953 and was endorsed "For deposit John Malakoff, John Malakoff, Special." The check was deposited in a Malakoff Special account in the Bank of the Manhattan Company.

[fol. 178] After the check was mailed to Malakoff, claimant received through the mails Certificate No. 40. This certificate is regular on its face. The stub for Stock Certificate No. 40 is also regular on its face except that the word "out" appears thereon. No testimony was adduced to explain the presence of this word on the stub.

Approximately one week after February 17, 1953, claimant received a dividend check for Sixteen dollars and some cents. This must have been $16.67. Claimant stated that she did not receive any further dividend payments and there is no evidence to the contrary. Claimant had no other transactions with Malakoff apart from her Nazareth investment.

Claimant paid no money directly to Nazareth. Nevertheless, claimant in good faith gave Malakoff $1,000 as an investment in Nazareth stock. The sum of $16.67 was returned to her. Accordingly, the sum of $983.33 constitutes the net fair value of Rose Kaplan's investment in Nazareth.

65. Claim No. 26 for 5 shares of Nazareth stock was filed by *Robert A. Noire*. This claim is based upon Certificate No. 58 dated the 2nd day of March 1953. The stated consideration for this stock is $5,000 in the form of a check for that amount endorsed over to Malakoff. No attorney in fact was designated in the claim.

Objections to the allowance of Stock Claim No. 26 were filed by the debtor and the Margolis group. These objections were substantially the same as those advanced to the allowance of the stock claim of George Bond. Claimant filed an answer to the Margolis objections. Notice of a hearing on the said objections was given by the Examiner to claimant and other parties in interest.

[fol. 179] Claimant testified that he heard of Nazareth stock from Helen Bernstein during the winter of 1952-53. Helen Bernstein was a customer in the beauty salon in which Noir was a hair stylist. After talking with Helen Bernstein, Noir and his wife decided to obtain some Nazareth stock.

Claimant met Malakoff on March 16, 1953. He was introduced to Malakoff by Helen Bernstein. According to Noire, Malakoff told Noire and his wife that he, Malakoff, was the President of the Nazareth corporation. He explained the Nazareth corporation and showed Noire a stock certificate and then said that each share would cost $1,000. Noire asked Malakoff if he would personally guaranty the investment and Malakoff told him that he would.

At the meeting on March 16, 1953 Noire gave Malakoff a check for $5,000 of the Greenwich Savings Bank payable to Robert A. Noire which Noire endorsed in blank. Underneath Noire's endorsement is the endorsement of John Malakoff and the following: "ok for cash M.S. Sternberg". Noige must have been prepared to invest $5,000 in Nazareth because he came to Malakoff's office with the savings bank check.

Evidently on the 16th day of March 1953, Noire received from Malakoff in exchange for his check Stock Certificate No. 58. This stock certificate had previously been signed in blank by Jerome Fried as Secretary and had been dated the 2nd day of March 1953. It is not clear whether Malakoff signed the certificate on March 16 or prior thereto but that is unimportant. The stock certificate has the following [fol. 180] endorsement "This stock certificate represents five (5) $1,000. shares. It is guaranteed to pay a minimum return of twenty (20%) per-cent per annum in equal monthly payments. The original investment of $5,000. is also personally guaranteed by JOHN MALAKOFF. John Malakoff." The stub for Certificate No. 58 is completely regular on its face. Claimant received no dividends from Malakoff.

Noire did not have any dealings of any kind with Malakoff other than his Nazareth deal. He also had no dealings with Helen Bernstein apart from her patronizing his place of business. Noire understood that he was buying stock of a corporation, original issue, direct from the corpora-

tion but that is not consistent with Noire's turning over the bank check to Malakoff personally. In any event, Noire gave Malakoff $5,000 for investment in Nazareth. He did so in good faith. No part of the $5,000 was returned to him. Accordingly, the sum of $5,000 constitutes the net fair value of the investment of Robert A. Noire in Nazareth.

66. Claim No. 6 for 10 shares of Nazareth stock was filed by *Harry Forman*. This claim is based upon Certificate No. 59 for 5 shares dated the 13th day of March 1953 and Certificate No. 73 for 5 shares dated the 23rd day of April 1953. The stated consideration for this stock is $11,000. No attorney-in fact is designated in the proof of claim.

Objections to the allowance of Stock Claim No. 6 of Harry Forman were filed by the debtor and by the Margolis group. The debtor's objections alleged that Malakoff did not own the stock represented by the certificates which were delivered to claimant; that the stock was delivered [fol. 181] for balances due claimant for personal indebtedness purportedly owed by Malakoff to claimant; that no consideration passed to the debtor; that whatever balances were due by Malakoff to claimant were based upon New York transactions involving a usurious rate of interest; that one certificate issued to claimant did not have duly authorized signatures; that Malakoff owed no money to claimant at the time the stock was issued to him; and that the stock held by claimant is in the overissued stock of Nazareth. The Margolis objections also pleaded overissue and other objections.

Claimant filed an answer to the objections of the debtor. Notice of the hearing on the said objections was given by the Examiner to claimant and other parties in interest.

Claimant testified that he first met Malakoff some time around 1936. Prior to 1950, claimant was an insurance agent and real estate broker and came to know Malakoff because he worked for the renting agent of the building where Forman had his office. Malakoff referred some insurance business to Forman and they became friendly. Malakoff did not receive any commissions from Forman on the business that he referred to him.

In 1950 or 1951, Forman was asked by Malakoff to enter into a joint venture with him. Forman had made some loans to Malakoff to repay Malakoff for his past consideration and these loans had evidently been repaid.

Some time in March 1953, Malakoff went to Forman's office which was at Astor Place and Fourth Avenue. No one else was present. Malakoff asked Forman whether he [fol. 182] would be interested in purchasing some stock in Nazareth. He described the operation of the market in very glowing terms and recommended that Forman purchase five shares of stock. Forman agreed to buy five shares of stock for $5,000. At that time there were no open transactions between Forman and Malakoff and neither one owed the other any money.

Forman claimed that he paid for the five shares with a check for $5,000 of Alwin Curtain Shop payable to John Malakoff. He said that he returned this $5,000 to the Alwin Curtain Shop thereafter. He also testified that there was no other consideration paid by him to Malakoff for the purchase of the five shares of stock represented by Certificate No. 59, which he claimed he got from Malakoff in his (Forman's) office in March 1953.

Forman then produced check of Alwin Curtain Shop for $5,000 dated April 23, 1953 payable to the order of John Malakoff and drawn upon the Public National Bank and Trust Company. This check was endorsed John Malakoff and was deposited in the Corn Exchange Bank Trust Company. He also produced his check for $5,000 dated July 15, 1953 drawn on the Corn Exchange Bank Trust Company and payable to Alwin Curtain Shop. When it was pointed out that he had testified that Stock Certificate No. 59 had been given to him in March 1953 by Malakoff whereas the Alwin Curtain Shop check was dated April 23, 1953 he stated that he had inadvertently presented the wrong certificate to the court and that he had another certificate for five shares which tied in precisely with the date of the Alwin Curtain Shop check. Claimant then re- [fol. 183] ferred to Certificate No. 73 for five shares dated the 23rd day of April 1953. Forman then testified that he obtained this stock certificate from Malakoff on April 23, 1953 in exchange for the Alwin check.

According to Forman, prior to March 20, 1953 Malakoff painted a glowing picture of Nazareth. He told Forman that people were paying more than $1200 a share for the stock and that Forman could purchase the stock for $1200 per share. Forman agreed to purchase five shares for $6,000 and this purchase was made on March 20, 1953.

Forman produced photostatic copy of his check for $6,000 payable to Malakoff dated March 20, 1953 and drawn upon the Corn Exchange Bank Trust Company. This check was endorsed by John Malakoff and deposited in the Corn Exchange Bank Trust Company. There is nothing on this check or on the Alwin Curtain Shop check to connect these checks to Nazareth. Forman testified that in order to pay for the stock he obtained a loan for $6,000 from the Astor Place Branch of the Corn Exchange Bank. He produced a paid note signed by him to the Corn Exchange Bank Trust Company for $6,000 dated March 20, 1953. The note states that as security therefor Forman had given to the bank a series of twelve notes of John Malakoff Special for $500 each due "May 2, 1953 through April 2, 1953." An endorsement on the note indicates that a $500 payment was made thereon on May 5, 1953.

Forman also testified that Malakoff was reluctant to sell the stock but agreed to do so on condition that Forman would sell the stock back to Malakoff if he desired it. The final result was that Forman was to borrow $6,000 from [fol. 184] the Corn Exchange Bank Trust Company and Malakoff was to assume the repayment of the $6,000 at the rate of $500 a month, and when fully paid Forman was to return the stock to Malakoff. According to Forman, he was to receive the dividend payments on the five shares at the rate of 20% per annum during the period of the loan arrangement and security represented by the stock.

Malakoff gave the stock certificate to Forman on March 17, 1953 three days before he received the $6,000 check from Forman. He also gave Forman on March 17, 1953, twelve promissory notes for $500 each signed John Malakoff, Special and payable monthly to the order of Harry Forman commencing in May 1953. These were the notes which were all endorsed by John Malakoff and Harry Forman and then given to the bank as security for Forman's

$6,000 loan. Malakoff did pay the first note for $500 and that was the only one that Malakoff paid, so Forman testified.

Forman paid interest to the Corn Exchange Bank on his $6,000 loan. He did not receive any dividends on any of the Nazareth stock that was turned over to him by Malakoff. Forman said that Malakoff told him that he was selling corporate stock. Forman knew that Malakoff was President of Nazareth and Forman stated that he intended to buy stock of Nazareth directly from the corporation. Forman was most emphatic in his statement that his $6,000 check was given to Malakoff in payment of five shares of Nazareth stock represented by Certificate No. 59.

[fol. 185] Stock Certificate No. 59 is dated the 13th day of March 1953, is signed only by John Malakoff and is for five shares and is issued in the name of John Malakoff. The certificate is not signed by the Secretary of Nazareth nor does the corporate seal appear thereon. The certificate is endorsed over to Harry Forman and Jerome Fried is designated as attorney to transfer the shares. The endorsement is dated March 17, 1953 and was signed by John Malakoff. The stub for Certificate No. 59 has the word "security" thereon in two different places. The name "Harry Forman" appears thereon in pencil and the words "cancelled" and "Margolis" appear thereon and are then crossed out.

Certificate No. 73 is dated the 23rd day of April 1953 and is signed by Jerome Fried as Secretary and John Malakoff as President. No seal appears on this certificate. This certificate is for five shares and is in the name of John Malakoff. This certificate was undoubtedly one which had been signed in blank by Jerome Fried. This certificate is also endorsed over to Harry Forman by John Malakoff. The date appearing on the endorsement is April 23, 1953. The stub for Certificate No. 73 has the words "Ben Margolis no deal" and the words "as security." In addition, the words "out" and "cancelled" appear thereon.

Harry Forman signed a questionnaire on the 9th day of February 1954. In this questionnaire Forman was asked to detail his transactions with Malakoff. His answer was as follows:

[fol. 186] "On March 20, 1953 I loaned Malakoff $6,000 he gave me 5 shares of Nazareth stock as collateral security and agreed I was to keep the stock if he defaulted in repayment of this money. On April 23, 1953 I gave him $5,000 more and he gave me an additional 5 shares of stock with the same agreement. On June 2, 1953 he defaulted in the repayment of this money. Therefore according to our agreement I retained possession of the 10 shares of stock."

The issue here, as posed by the debtor, is whether Malakoff made a personal loan from Forman and gave him Nazareth stock as security. The testimony of Harry Forman is contradictory. He engaged in many transactions with Malakoff. Forman gave Malakoff two checks on December 26, 1952, one for $500 and the other for $3500 which checks were endorsed by Malakoff personally and as agent. The $500 check was deposited in the bank account of Ambassador Estates Inc. with the Corn Exchange Bank Trust Company. The $1500 check was deposited in the Malakoff Agent account in the same bank. On the other hand, a check of John Malakoff, Agent for $4,000 was issued to Harry Forman on December 28, 1952. This check was drawn upon the Corn Exchange Bank Trust Company and was certified by Harry Forman and then deposited in his real estate account. This check may have been in exchange for the two checks of $3500 and $500.

Forman received a check for $5,000 of John Malakoff Special dated January 21, 1953 and drawn upon the Bank of the Manhattan Company. Forman testified that this represented repayment of a loan made to Malakoff by Forman. Forman did produce a check for $5,000 dated January 7, 1953 payable to John Malakoff which was endorsed John Malakoff Agent and deposited in the Malakoff [fol. 187] Agent account in the Corn Exchange Bank Trust Company.

Forman received a check for $1500 of John Malakoff Special dated February 10, 1953 and drawn upon the Bank of the Manhattan Company. Forman testified that this check related to a parcel of real estate at 214 Riverside Drive. He said that he and Malakoff became joint venturers in regard to this property, kept it a short while and then sold it at a profit.

Forman produced a $3,000 check to Malakoff dated February 9, 1953 which was deposited in Malakoff's Special account in the Bank of the Manhattan Company, a check for $1500 dated February 19, 1953 payable to the Corn Exchange Bank Trust Company presumably to make good a bad check of Malakoff and a check for $2,000 dated February 4, 1953 payable to the order of Cash which related to Malakoff.

Claimant produced twelve promissory notes of John Malakoff for $700 each and dated October 15, 1951. These notes were signed by Malakoff as Agent and were payable to Harry Forman. Forman testified that these notes were eventually paid by Malakoff without interest and that he received no bonus in connection with the loan which was evidenced by the notes. The seventh and twelfth notes of the series were not paid when they were presented but Malakoff subsequently deposited sufficient funds to cover these notes. Forman said that he lent Malakoff $4,000 three or four weeks before December 28, 1952 despite the fact that the last note in the series of $700 notes had been returned unpaid and Malakoff had to make a deposit in order to make that note good. On the loans theretofore made by Forman to Malakoff, Forman did not request any security.

[fol. 188] It is perfectly plain that the transaction Forman had with Malakoff on or about the 17th day of March 1953 was a security transaction so far as the Nazareth stock was concerned. Malakoff needed money and he agreed to give Harry Forman Stock Certificate No. 59 as security for the repayment of the $6,000. It is likely that Forman received other security. The stock certificate given to Forman by Malakoff, that is Certificate No. 59, was defective on its face. However, on the theory that Forman was dealing with Malakoff and Malakoff intended to give him as security an interest in Nazareth the defective character of the stock certificate is unimportant. The sum of $500 was repaid to Harry Forman. Forman stated that he did not charge Malakoff any interest or bonus with respect to the loans that he made to him. It is reasonably clear, however, on the basis of all the facts that Forman at least received a bonus of $500 in connection with a $5,000 loan

made to Malakoff. The amount of this bonus should be deducted from the balance of $5,500 of the $6,000 loan. The balance of $5,000 was not repaid.

The second deal involving the payment of $5,000 for five shares of stock evidenced by Certificate No. 73 likewise seems to have been a security transaction despite Forman's testimony to the contrary. Still there is no evidence that Malakoff repaid the $5,000 to Forman so Forman would seem to be entitled to an interest in Nazareth to the extent of that $5,000.

Forman advanced $6,000 and $5,000 to Malakoff. The sum of $500 was repaid and the bonus of $500 should be deducted. Accordingly, the sum of $10,000 constitutes the net fair value of the investment of Harry Forman in Nazareth.

[fol. 189] 67. Stock Claim No. 39 for 6 shares was filed by *Richard S. Hull*. This claim is based upon Certificate No. 8 for 4 shares dated the 2nd day of February 1953 and Certificate No. 62 for 2 shares dated the 2nd day of April 1953. The stated consideration for such stock is as follows: claimant's check for $2,400 to Malakoff dated August 25, 1951; claimant's check for $1,200 to Malakoff dated October 4, 1951; and certain legal fees then due or about to become due from Malakoff to claimant. The amount of these legal fees is not stated. No attorney in fact is designated in the claim.

Objections to the allowance of Stock Claim No. 39 were filed by the debtor. These objections allege that Malakoff had no title to the stock delivered to claimant and that no consideration passed to Nazareth. In addition, the debtor by way of counterclaims alleges that claimant is indebted to the debtor in the sum of $4,000, the unpaid subscription price; that by preparing minutes and/or predating the same and participating in a certain transaction involving $11,811.78 claimant assisted in the diversion of assets of Nazareth to that extent and is liable therefor; that claimant conspired and/or participated with Malakoff so as to enable Malakoff to divert Nazareth assets to Malakoff's personal benefit or for the benefit of other ventures in which Malakoff was interested and claimant by reason of

such acts and other conduct became liable to the debtor in the sum of approximately $250,000; and that assets of an indeterminable amount were diverted so as to inure to the benefit of Malakoff personally and the claimant, and [fol. 190] claimant is liable to the debtor therefor. Notice of a hearing on the said objections was given by the Examiner to claimant, to Melvin L. Robbins, Esq., attorney for Robert H. Davidson, Assignee of the Hull claim, and to the attorney for the debtor.

Hull first met Malakoff some time in 1940 or 1941. According to him, he purchased 4 shares of Nazareth stock on August 25, 1951 and 2 shares on October 4, 1951. The price was $1,000 per share which was paid partially by check and partially by balancing off some moneys that Malakoff owed Hull on legal fees.

Hull produced two of his checks payable to the order of John Malakoff and drawn upon the Chase National Bank. One of these checks was dated August 25, 1951 and amounted to $2,400, the other was dated October 4, 1951 and was in the sum of $1,200. The check for $2,400 was endorsed John Malakoff, John Malakoff, Agent and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. The check for $1,200 was endorsed John Malakoff and was likewise deposited in the Corn Exchange Bank Trust Company.

The six shares of stock were purchased by Hull for $600 a share. Hull testified that he reached an agreement with Malakoff to waive anything above $5,000 due him for legal fees in connection with a Springfield Gardens venture, and because of that Malakoff agreed to sell him Nazareth stock at the reduced price of $600 a share.

Hull said that he received dividends of $40 per month from Malakoff in August, September and October 1951 and thereafter received dividends at the rate of $50 per month. [fol. 191] He also testified that he received a series of checks in the sum of $50 each starting on October 1, 1951 and ending on May 1, 1953 with some missing in between. The Siegel, Berg report reflects two payments of $60 each to Hull in February and March 1953 from the Nazareth account in the Second National Bank. Also there were produced and marked in evidence 16 checks of John Mala-

koff, Agent or John Malakoff, Special or John Malakoff each in the sum of $60 payable to the order of Richard Hull. The first check was dated October 1, 1951 and the last check May 1, 1953. A $60 check was issued each month between October 1951 and May 1953 except in September and October 1952 and February and March 1953. The Nazareth checks took care of February and March 1953. Hull did get a check for $75 of John Malakoff, Special on October 1, 1952 and it may be assumed that this check included the $60 dividend payment due in October 1952. It is also reasonable to assume in the light of all the facts that Hull received a dividend payment in September 1952. Of the 16 checks, the first 14 were drawn upon the Corn Exchange Bank Trust Company and the April and May 1953 were drawn upon the Manufacturers Trust Company. On the basis of an investment of $2,400 interest at the rate of 20% per annum would be $480 per year and $40 monthly. If the investment was made on August 25, 1951, the first dividend payment should not have been made to him until about the first of October 1951. His testimony was that he received $40 commencing with August 1951 but he must have been mistaken in his recollection. The check for $1,200 was given to Malakoff on October 4, 1951. Consequently the first dividend on the investment of $3600 would have [fol. 192] become due on or about the first day of November 1951. On the basis of an investment of $3,600 the annual dividend would have been $720 or $60 monthly. The payments made by Nazareth in February and March 1953 reflect interest at the rate of 20% per annum on an investment of $3,600.

The dividend checks for $60 each should not have started at the earliest before November 1, 1951. Malakoff did not pay dividends in advance. It is clear that Hull's first dividend payment from Malakoff for $60 was made on October 1, 1951. That raises a question as to whether the $1,200 check of Richard Hull dated October 4, 1951 was actually given to Malakoff for Nazareth stock. If Malakoff followed his regular practice, he certainly would not have given Hull a dividend on October 1, 1951 based upon an investment of $1,200 which had not then been made and which was made thereafter on October 4, 1951. If Hull did not prior to

October 1, 1951 give Malakoff $1,200 in addition to the $2,400 check of August 25, 1951, then the $60 dividend check on October 1, 1951 can only be explained on the theory that it represented an adjusted dividend on the $2,400 investment for the month of September 1951 and six days in August 1951.

Hull received in all from Malakoff 20 dividend payments of $60 each. Thus the sum of $1,200 was returned to him by Malakoff.

Hull had other transactions with Malakoff. He purchased an interest in the Hotel Margaret either in 1951 or 1952. He received monthly dividend payments of $33.34 on this investment commencing in June 1952. Prior thereto and in April and May 1952 he received monthly payments of [fol. 193] $16.67 from Malakoff. The investment made by Hull in the Hotel Margaret totalled $2,000. Hull gave Malakoff a check for $1,000 on March 21, 1952 and another check for the same amount on April 15, 1952. Both of these checks were endorsed John Malakoff, John Malakoff, Agent and were deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company.

Hull also claimed that he made a loan of $1,000 to Malakoff which was not repaid He testified that for this loan made some time around June 1952 Malakoff gave Hull an additional interest in the Hotel Margaret.

Stock Certificate No. 8 for 4 shares is regular on its face. The stub for this certificate has the word "out" written thereon and then partly crossed over. Stock Certificate No. 62 which is dated the 2nd day of April 1953 and which is for 2 shares is regular on its face but no seal appears thereon. The stub for Certificate No. 62 has nothing thereon to indicate that it was issued subject to any qualifications, conditions or limitations.

The debtor urges that Hull's testimony is contradictory in many respects. The debtor also argues that the fact that Hull was an attorney and director of the debtor during the years this situation developed should be taken into consideration in the allowance of his stock claim. In addition the debtor contends that offsets and counterclaims against Hull should be considered in conjunction with his stock claim.

The record is barren of any testimony to support a charge that Hull was a party to the diversion of Nazareth assets by Malakoff. It is true that Nazareth was entitled to the amount recovered on windstorm insurance. However, [fol. 194] Nazareth was indebted to Malakoff at the time and was in sole control of the operation of the business. Subject to the claims of creditors, Malakoff was entitled to reduce any bona fide indebtedness of Nazareth to him by appropriating the windstorm damage recovery. The so-called back-dating of the corporate minutes do not establish fraud on Malakoff's part in respect of Nazareth nor do they make Hull a party to a fraud upon the corporation.

The problem in regard to the allowance of Hull's stock claim is whether he should be deemed to have paid $6,000 for the 6 shares of stock issued to him or only $3,600. The solution to that problem depends upon whether Hull actually extinguished part of legal fees which were then due and owing to him by Malakoff. Hull wanted a fee of $7,500 on a Bayside deal and it seems that Malakoff offered to sell him Nazareth stock at $600 per share if Hull would limit his Bayside fee to $5,000. The reduction of the fee from $7,500 to $5,000 seems to have been part of a bargaining process and Hull was induced to accept $5,000 because of the opportunity to buy Nazareth stock at $600 per share. Hull actually did not give up $2,500 in legal fees as part consideration for the purchase of the six shares of stock. He paid only $600 per share for the stock and his total investment in the stock was therefore only $3,600. A total of $1,200 was returned to him, as heretofore stated. Accordingly, the sum of $2,400 constitutes the net fair value of the investment of Richard Hull in Nazareth.

[fol. 195] 68. Claim No. 16 for 11 shares of Nazareth stock was filed by *Herbert Danziger* and *Melvin Danziger*. This claim is based on Stock Certificate No. 74 dated the 28th day of April 1953. The stated consideration for this stock was $10,946.97 which had been advanced to Malakoff by claimants in connection with another venture and which Malakoff had agreed to return but had not done so. No attorney in fact was designated in the claim. Objections to the allowance of Stock Claim No. 16 were filed by the debtor and by the Margolis group. The debtor's objections were that Malakoff had no title to the stock issued to

claimants and that no consideration passed to Nazareth. The debtor also asked for an affirmative judgment of $11,000, the unpaid subscription price. The Margolis objections alleged that the stock was issued to claimants conditionally and without any consideration passing to Malakoff. These objections also allege that stock issued to claimants was in excess of the authorized issue of 200 shares. A reply to the Margolis group objections was filed by claimants by Leonard Franklin, Esq. Notice of a hearing on the said objections was given by the Examiner to the claimants, Mr. Franklin, the attorney for the debtor and the attorney for the Margolis group.

Herbert Danciger first met Malakoff some time during 1950. He was introduced to Malakoff by his mother-in-law, Gertrude Klein. The first transaction Herbert Danciger had with Malakoff was about January 1951. In all transactions with Malakoff, Herbert Danciger was a partner with his brother, Melvin, and in negotiations with Malakoff, Herbert acted for himself and his brother.

[fol. 196] The first transaction involved purchase of an interest in the Locust Street Properties in Philadelphia. The Dancigers purchased a 25% interest in that property for $5,500 by check dated January 5, 1951. This check was made payable to John Malakoff and was endorsed John Malakoff, John Malakoff, Agent and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company.

In the early part of 1953, the Philadelphia property was sold and the Dancigers received a check for $6,000. Shortly thereafter, they received another check for two hundred and some odd dollars. In the Philadelphia venture a friend of the Dancigers, Morris Schrier, was also a partner. Evidently the remittance check on the Locust Street Properties was received by Malakoff. He, in turn, issued a check of John Malakoff, Agent for $6,000 to Herbert Danciger on November 14, 1952 drawn on the Corn Exchange Bank Trust Company. Despite the fact that Herbert Danciger testified that the Philadelphia property was sold in the early part of 1953, the record shows that the Philadelphia property was actually sold on October 23, 1952. This ties in with the

$6,000 check from Malakoff to Herbert Danciger dated November 14, 1952.

The next transaction of the Dancigers with Malakoff involved the purchase of a leasehold from him in Roslyn Heights, Long Island, New York, for $12,500. According to Herbert Danciger, he made an initial payment of $1,229.83 for his purchase of the Roslyn Heights venture by means of a check for that amount dated October 16, 1952 payable [fol. 197] to the order of Daniel D. Kantor and drawn upon the Manufacturers Trust Company. He also on October 16, 1952 endorsed over to the Morrisart Realty Corp. his certified check for $7,000 dated October 16, 1952 and drawn upon the Manufacturers Trust Company. In addition, he issued a check for $4,000 on November 17, 1952 to the order of Jack Malakoff and drawn upon the Manufacturers Trust Company. This check was endorsed John Malakoff, John Malakoff, Agent and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company.

The contract closing of the leasehold in Roslyn Heights took place on October 16, 1952. The closing papers provided for the assignment of a leasehold by Baltimore Realty Corp. to Herbert and Melvin Danciger in consideration of the payment of the sum of $12,500. The papers stated that the Dancigers would pay to Malakoff a brokerage commission of $1,500 on or before the 22nd day of October 1952. The passing of title was fixed for a time not later than January 15, 1953. The assignment to the Dancigers was executed by Richard S. Hull as President of the Baltimore Realty Corp. The Baltimore Realty Corp. had acquired title to the leasehold from the Morrisart Realty Corp. on October 16, 1952. As part of that closing the two checks of Herbert Danciger, one for $1,229.83 and the other for $7,000, were used.

Herbert Danciger became interested in the Roslyn Heights property around October 15, 1952. He met Richard Hull for the first time at the closing of the leasehold. In Herbert Danciger's discussion with Malakoff, the latter showed him a brochure which printed a rosy picture of the Roslyn Heights property. This brochure was marked in evidence.

[fol. 198] After the closing of the Roslyn Heights property, Danciger found that the rents were not paid when they became due, that the rent roll was not as represented originally by Malakoff, and that some of the tenants were ready to move out because business was poor and taxes were in arrears. Between October 16, 1952 and March 18, 1953, Danciger had conversations with Malakoff with reference to the representations that Malakoff had made to him. As a result of these conversations Malakoff agreed to collect the rents for Danciger, and later said that he would sell the property for Danciger within 30 days at a profit. Finally Malakoff told Danciger that he would repurchase the Roslyn Heights property from him at cost. Malakoff said that he did not have the money to pay for the property and it was agreed that Malakoff would give Danciger twelve post-dated checks totalling approximately $12,000.

Herbert Danciger and Malakoff executed an agreement whereby both Dancigers assigned their interest in the Roslyn Heights leasehold to Malakoff in consideration of the sum of $11,946.97. This sum was payable $1,000 on April 18, 1953, and a like sum of $1,000 monthly thereafter, except that the last payment should be $946.97. Malakoff agreed to assume all liabilities then outstanding incurred in the operation of the premises and Malakoff was to receive all rents then due and unpaid. Malakoff further agreed to relieve Danciger from any and all liabilities arising from the operation of the premises.

Herbert Danciger said that the first check of Malakoff for $1,000 was returned unpaid because the account was closed. When he reported this fact to Malakoff, he was informed that the account had been closed for business [fol. 199] reasons. Malakoff offered to give Danciger accelerated notes on a new bank, and the first note of the new series given Danciger by Malakoff was payable on April 22, 1953.

The first note was returned unpaid. Danciger again contacted Malakoff and he was then given a check to replace the note. Malakoff at that time also gave Danciger eleven shares of Nazareth stock as collateral for the balance of

the notes which was $10,946.97. This stock certificate was received from Malakoff on April 28, 1953.

The first note must have been paid by check of John Malakoff for $1,005 dated April 23, 1953 payable to the order of Danciger Brothers and drawn upon the Manufacturers Trust Company. This check apparently was first returned unpaid and then on April 27, 1953 was certified by the bank upon which it was drawn.

Stock Certificate No. 74 has the following legends upon the face thereof: "These shares are not saleable *JM* put up as security on R slyn deal." The stock certificate is in the name of Herbert and Melvin Danciger and is signed by Jerome Fried and John Malakoff. The stub for Certificate No. 74 has a number of notations thereon. First there is the word "unpaid" written in pencil. Then the legend "security only not saleable" appears. The word "void" appears on the stub and then seems to be crossed out. Then there is the legend "written on shares". Finally there appears the legend "Re Roslyn". The stub and the certificate clearly indicate that the stock was given to the Dancigers by Malakoff as security for the payment of the moneys owing by Malakoff to the Dancigers.

[fol. 200] According to Herbert Danciger when Note No. 2 for $1,000 was returned marked insufficient funds, he called Malakoff and told him that in view of his agreement he and his brother would consider themselves the owners of the stock which they had originally obtained as collateral. Danciger admitted that he did not get the Nazareth stock when the Roslyn repurchase agreement was executed. He also said that he knew Malakoff was President of Nazareth and that he did not ever pay any money to Nazareth for the stock certificate. Danciger stated that he never received any income, profit or dividend on any of the stock from Nazareth. This is not surprising since Malakoff practically ceased paying dividends in May 1953.

Danciger said that he did not ask Malakoff for security but that Malakoff voluntarily stated that he would give Danciger some stock in Nazareth to secure payment of the loan and if the next note was not paid then the stock would become Dancigers. Danciger said that he received the stock certificate from Malakoff on April 28, 1953.

The debtor maintains that the issue as to the allowance of the Danciger stock claim is whether the transfer of original capital stock of Nazareth in exchange for a personal claim of the Dancigers against Malakoff was proper. The debtor also contends that it was not appropriate for the Nazareth stock to be given as security for a personal indebtedness of Malakoff to the Dancigers and that, in any event, the stock could not properly have been given to the Dancigers for a past consideration. In the view of the [fol. 201] Examiner, it is immaterial whether the consideration to Malakoff was past or present. Admittedly no present consideration passed to Malakoff when the stock was given to the Dancigers as security. Furthermore, whether the stock was given as collateral security or in satisfaction of an indebtedness of Malakoff to the stockholder is irrelevant.

There was undoubtedly an indebtedness of Malakoff to the Dancigers. That indebtedness was created by the agreement of March 18, 1953 between the Dancigers and Malakoff, if a liability in favor of the Dancigers did not exist prior thereto. Moreover, Malakoff was liable to the Dancigers on the unpaid promissory notes. There is no evidence in the record to support a finding that the Dancigers conspired with Malakoff to deprive the other stockholders of any rights they enjoyed at the time the Dancigers received the stock certificate from Malakoff.

The Dancigers had a claim against Malakoff for $10,946.97. There is no evidence that any part of that claim was paid by Malakoff. Accordingly, the sum of $10,946.97 constitutes the net fair value of the investments of Herbert and Melvin Danciger in Nazareth.

69. Claim No. 2 for 3 shares of Nazareth stock was filed by *Leslie Saul*. This claim is based upon Stock Certificate No. 20 dated the 2nd day of February 1953. No attorney in fact was designated in the claim.

[fol. 202] Objections to the allowance of Stock Claim No. 2 of Leslie Saul were filed by the debtor and by Benjamin Margolis, et al. The objections of the debtor charged that Malakoff had no title to the stock that was issued to the claimant and that no consideration passed to the debtor. The debtor pleaded a counterclaim in which it prayed for

judgment of $3,000, the alleged unpaid subscription price of the stock. The Margolis objections attempted to incorporate as objections to the Saul claim the objections that had been filed by the debtor to the allowance of the claims of the Margolis group. Claimant Saul filed a reply to the debtor's objections in which she alleged that she had purchased her stock from Nazareth and paid therefor by check given to Malakoff as Agent for Nazareth. Notice of a hearing on said objections was given by the Examiner to the claimant and other parties in interest, including Herman L. Falk, Esq., who had filed a reply for claimant.

Leslie Saul first testified that she met Malakoff in 1952. At that time he told her that he had 200 shares of Nazareth stock and that he intended to sell 100 shares thereof and retain the balance. Later she testified that she knew Malakoff six months prior to September 18, 1951 and that she had had one business transaction with him. That transaction involved an investment of $400 on her part and with respect to which she received a $250 profit represented by a check of John Malakoff Agent for that amount dated July 14, 1951 and drawn upon the Corn Exchange Bank Trust Company. Over the endorsement of Leslie Saul on this check, however, appears the following: "Re Bleeker-Exchange".

[fol. 203] In addition she testified that a couple of months prior to September 18, 1951 Malakoff approached her through a friend and tried to interest her in Nazareth. Malakoff, at their first meeting, told claimant that he owned 200 shares of Nazareth, that a corporation had been organized and that the stock had been issued to him. Malakoff told her that she was to get 3/200ths of the stock for $3,000 and that these three shares would come from the 100 shares that he intended to sell. It was agreed that the price per share would be $1,000.

Claimant was mistaken in her original testimony that she first spoke to Malakoff about Nazareth stock in 1952 for she produced a check for $3,000 dated September 20, 1951 payable to the order of John Malakoff which she said represented the purchase price of three shares. This check was drawn on the Clinton Trust Company, New York, and was endorsed John Malakoff, John Malakoff, Agent and

was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Over the endorsement appears the word "Nazareth".

Claimant testified that she went to Malakoff's office and delivered the $3,000 check to him on September 21, 1951 and that testimony undoubtedly is correct. She said that Malakoff gave her a letter stating that he would send the stock certificate to her without specifying the time when this would be done and she produced a letter dated September 18, 1951 signed by John Malakoff. This letter acknowledged receipt of $3,000, stated that dividends at the rate of 20% per annum payable monthly had been declared and [fol. 204] indicated that the corporation might be dissolved and a limited partnership substituted therefor, in which event Leslie Saul would have an interest therein proportionate to her investment. The letter also stated that the total shares issued were 200 and that she had a 3/200th part of the deal.

According to claimant, about a month after making the investment of $3,000 she commenced to get dividends on her $3,000 investment at the rate of 20% per annum payable monthly. Claimant received $50 checks monthly of John Malakoff, Agent or John Malakoff, Special drawn upon the Corn Exchange Bank Trust Company commencing with November 1951 and continuing through January 1953, as evidenced by cancelled checks which were marked in evidence. Claimant also received $50 checks of Nazareth in February and March 1953 drawn upon the Second National Bank of Nazareth, Pennsylvania. In addition, claimant received $50 checks of John Malakoff in April and May 1953 drawn upon the Manufacturers Trust Company. Thus claimant received a total of $950 in so-called dividends.

Claimant received Stock Certificate No. 20 through the mails from Malakoff on or about February 2, 1953. Neither at the time the $3,000 was given to Malakoff nor at the time of the receipt of the stock certificate, so Saul testified, did Saul have any knowledge of any irregularity in connection with the issuance of stock certificates of Nazareth nor of any overissue of stock. The stub for Stock Certificate No. 20 is regular on its face and there is nothing thereon to indicate that it was issued subject to any conditions, qualifications or restrictions.

[fol. 205] Leslie Saul invested $3,000 with Malakoff for 3 shares of Nazareth stock. This investment was made in good faith despite the fact that there is no proof that the consideration passed to Nazareth. The evidence is far from convincing that the $3,000 check of claimant was given to Malakoff in his capacity as Agent for Nazareth. That, however, is immaterial. Claimant invested $3,000 and the sum of $950 was returned to her in so-called dividends. Consequently the sum of $2,050 constitutes the net fair value of the investment of Leslie Saul in Nazareth.

70. Claim No. 5 for 3 shares of Nazareth stock was filed by *Jerome Fried*. This claim is based upon Certificate No. 15 dated the 2nd day of February 1953 in the name of Jerry Fried. The consideration for the stock is not set forth in the proof of claim. Meyer Kraushaar, Esq., 42 Broadway, New York 4, New York, was designated as attorney in fact for claimant. Jerome Fried also filed a creditor's claim in the sum of $17,326 with respect to which Meyer Kraushaar, Esq. was also designated as attorney in fact. The stated consideration for this claim is as follows: weekly wages—$13,200; expense of maintenance of automobile—$1840; commissions on gross income of business for the year commencing June 20, 1952 and ending June 19, 1953—$1640; and commissions on gross income of business from June 20, 1953 to September 28, 1953—$646. Such claim is based upon an alleged agreement made by Jerome Fried with Malakoff prior to June 20, 1952. This report [fol. 206] deals with Jerome Fried's stock claim and the testimony adduced at the hearings relating to the creditor's claim is discussed only to the extent that such testimony bears upon the allowance of the stock claim.

Objections to the allowance of the stock claim of Jerome Fried were filed by the debtor. These objections were as follows: Malakoff had no title to the stock which was issued to claimant for balances due claimant for personal indebtedness purportedly owed by Malakoff to the claimant; that no consideration passed to Nazareth; that Fried violated his trust as a director and officer of Nazareth and caused damage to the debtor in the sum of $10,000; that Fried knew or should have known that Malakoff was selling the capital

stock of the debtor and was not turning over the proceeds to Nazareth with the result that Nazareth was damaged in the sum of $250,000; that claimant cooperated with Malakoff in diverting the sum of $11,811.78 from Nazareth; that claimant actively and passively conspired with Malakoff or so conducted himself as an officer and director to enable Malakoff to divert other assets of Nazareth in an undeterminable amount, for which an accounting is requested; and that claimant and Malakoff participated in the diversion of corporate assets and claimant breached his trust as a director and officer by the assignment to claimant or a corporation controlled by him of a lease that was not in the best interests of Nazareth. The debtor prayed for an affirmative judgment against claimant in respect of the aforesaid matters to the extent appropriate. [fol. 207] Notice of a hearing on the said objections was given by the examiner to claimant and to the attorney for the debtor. No notice was given to Meyer Kraushaar, Esq. but Jerome Fried appeared in person at the hearings on the objection to the allowance of his stock claims and his creditor's claim and made no objection to lack of notice to his designated attorney in fact. Claimant was given an opportunity to obtain counsel to represent him at these hearings.

Jerome Fried testified that he became manager of the Nazareth Farmers Market in June 1952 and continued in that capacity under the direction of Malakoff until about June 29, 1953. Thereafter Fried continued as manager under the direction of Arnold Weinstein who had become president of Nazareth. He was acting as manager of the market on September 28, 1953 when the reorganization petition was filed and he has continued as manager since that date.

According to Fried, in 1950 he acquired an interest in certain property known as 96 Warren Street, New York. This property was purchased by him through Malakoff from Seymour Forman. He made a down payment of $1,000 and title was taken in his name and he managed the property and collected the rents until the winter of 1951 when the property was sold. At the time of the resale, Fried was to get back the $1,000 invested by him plus a profit of

$2100. He received the return of his principal of $1,000 but a check for $2100 of the purchaser representing the profit was turned over to Malakoff.

[fol. 208] Fried's testimony is that some time in August or September 1951 he told Malakoff to apply the $2100 towards an interest in Nazareth but he did not receive a receipt from Malakoff. He did get monthly dividend checks of $33.34, based on a $2,000 investment, and later he got Stock Certificate No. 15 for 3 shares of Nazareth stock.

Fried said that he was not told originally by Malakoff that Nazareth stock was being sold for $1,000 a share and did not know the number of shares he would get for his $2100 investment. Fried only knew what he would get monthly by way of dividends. Fried testified that he was only interested in the 20% return on the $2,000 investment and did not regard as meaningful the fact that he would receive three shares of stock.

Fried was positive that no part of the $2100 was returned to him by Malakoff. Any checks that read "obtained from Malakoff" represented such transactions as exchanges, commissions or salaries or possibly represented checks that he had cashed for Malakoff.

The first so-called dividend check that Fried received was one for $33.34 dated October 1, 1951, signed John Malakoff, Agent and drawn upon the Corn Exchange Bank Trust Company. Over the endorsement of Jerry Fried appears the word "Nazareth" in dark ink as contrasted with the endorsement and the writing on the face of the check which appears in light ink. It is likely that this check actually represented a return from a $2,000 investment in Nazareth. Thereafter and each month from November 1951 through January 1953 claimant received a check of John [fol. 209] Malakoff Agent or John Malakoff Special drawn on the Corn Exchange Bank Trust Company for $33.34. The word "Nazareth" appears over the endorsement of Jerry Fried on several of these checks. Fried received checks for $50 of Nazareth in February and March 1953 drawn upon the Second National Bank of Nazareth. In addition, he received a check of John Malakoff for $33.34 dated April 1, 1953 drawn upon the Manufacturers Trust Company. There is no evidence that Fried received any

dividend checks that cleared subsequent to the April 1953 check. Thus Fried received a total of $633.46.

Stock Certificate No. 15 for three shares is regular on its face. The stub for Stock Certificate No. 15 carries the legend "out". No explanation was offered as to the significance of this legend.

Fried testified that he engaged in various loan and exchange transactions with Malakoff. He knew that the market was owned by a corporation at the time he made his investment in Nazareth through Malakoff. Despite this fact he handled the negotiations under which his father acquired Nazareth stock and the check for this stock was made payable to Malakoff and not to the corporation.

Fried denied that he was a director of Nazareth in October 1951 and yet as a director he signed minutes of a meeting of directors allegedly held on October 17, 1951. He testified that these minutes were actually signed by him some time in May or June 1953. The same thing happened with respect to minutes of a meeting allegedly held on June 27, 1952.

[fol. 210] According to Fried, in January 1953 he signed a number of stock certificates of the debtor in blank. At the time he signed these certificates there were no other signatures on them. His signature was appended to the certificates as Secretary of the corporation.

Fried insisted that he did not draw any salary from Nazareth although he admitted that he received money from Malakoff personally on several occasions. So far as Fried knew, no money given to Malakoff for the purchase of Nazareth stock actually went into a bank account of the debtor.

So far as Fried's stock investment is concerned, it is reasonable to assume on the basis of all the evidence that Fried made an investment of $2,000 with Malakoff for the purpose of getting Nazareth stock. Fried was not interested in the number of shares of stock he would get but rather than in a return of 20% per annum on his investment. No dividends were earned or declared by Nazareth. The sum of $633.46 in capital was returned to Fried. Subject to the determination of the court with respect to the allowance of Fried's creditor claim, and subject to the resolution by

the court of the so-called affirmative defenses and counterclaims asserted by the debtor, the sum of $1,366.54 constitutes the net fair value of Jerome Fried's investment in Nazareth.

71. Claim No. 8 for 15 shares of Nazareth stock was filed by *Seymour Forman*. This claim is based upon Certificate No. 49 dated the 12th day of March 1953 issued in the name of John Malakoff and endorsed by him over to Seymour Forman. The proof of claim simply states that this stock [fol. 211] certificate was transferred to claimant by Malakoff "For good and valuable consideration." This proof of claim was sworn to the 28th day of February 1955 and was filed with the Honorable John E. Joyce, Referee in Bankruptcy, on the 28th day of February 1955. Claimant also filed with Referee Joyce on the 28th day of February 1955, a proof of claim for $5,000. The stated consideration for this claim is as follows: "A promissory note, dated March 12, 1953, made payable to the order of claimant on July 13, 1953, with interest at 6% per annum at Second National Bank, Nazareth, Pa., for moneys loaned by claimant to the said debtor." Louis R. Patur, Esq. was designated attorney in fact for the claimant in each proof of claim.

The debtor filed objections to the allowance of Stock Claim No. 8 of Seymour Forman upon the following grounds: that Malakoff had no legal title to the stock certificate which was delivered to claimant for balances allegedly due claimant for personal indebtedness purportedly owing by Malakoff to claimant; that no consideration passed to Nazareth; that the stock certificate held by Forman is void; that the stock was delivered by Malakoff to claimant as security for personal indebtedness from Malakoff to claimant; that claimant is not a purchaser for value in that claimant received from Malakoff more moneys than claimant loaned to Malakoff and any balance due from Malakoff personally to claimant resulted from transactions contrary to the public policy of the State of New York; that claimant loaned Malakoff personally or to Wales Corporation or Ambassador Estates Inc. the sum of $10,000 in August 1952, that claimant received two notes for $5,000 each therefor, one from Wales Corporation and the other from Ambassa-

[fol. 212] dor Estates, and that claimant or his daughter (actually his wife), Yvette B. Forman, thereafter, received payments in excess of the amount loaned, and that in March 1953 claimant received the certificate for 15 shares of Nazareth stock as security for the $10,000 loan and $5,000 then loaned to Malakoff personally; and that the stock received by claimant represents overissued stock. The debtor also in the alternative demands judgment against Seymour Forman in the sum of $15,000.

Objections to the allowance of Stock Claim No. 8 were also filed by the Margolis group. These objections attempted to incorporate as objections to the Forman stock claim objections theretofore filed by the debtor to the allowance of the stock claims of the Margolis group. These objections also alleged that the certificate held by claimant constituted stock in excess of the authorized issue of 200 shares; that the 15 shares were issued to secure the payment of $5,000 and that 10 shares should be returned or $10,000 paid to the debtor.

The debtor also filed objections to the allowance of Forman's creditor's claim No. 15. These objections allege that no consideration was given to the debtor for the debtor's note on which the $5,000 claim is predicated; that the note is void under Pennsylvania law; that claimant was paid for the note; that the note was given as collateral security for personal obligations owed to claimant by Malakoff personally; and that the stock of the debtor held by claimant is either void or voidable.

[fol. 213] Claimant filed a paper denominated "Answer of Seymour Forman to objections filed against his claim as a Stockholder." Claimant alleged that he received Certificate No. 49 for 15 shares of Nazareth stock as an inducement to renew promissory notes of Ambassador Estates Inc. and Wales Properties Inc. and to make an additional loan of $5,000 to Nazareth; that these notes were not paid when due; that appropriate actions were instituted in the New York City court on the three promissory notes; that the actions were tried on the merits on January 18, 1954 and judgments were entered against Malakoff individually and against Ambassador Estates, Inc. and Wales Properties, Inc. and not against Nazareth because of the pendency of

this proceeding; and that by virtue of the default in the payment of the three notes claimant became a bona fide stockholder of Nazareth to the extent of 15 shares. This answer also alleged that all holders and owners of Nazareth stock were equal victims of the machinations of Malakoff; that all should share equally as such victims; and that none should benefit more than any other because he was fleeced more expertly or less expertly than others by Malakoff. The answer further alleged that the assets of Nazareth were sufficient to recognize all stockholders on equal footing, i.e., on the basis of $1,000 per share, and that the net worth of Nazareth appears to be sufficient to recognize each share of stock for the full or nearly full value.

Claimant also filed an answer to the objections of the Margolis group in which, among other things, claimant challenged the right of the Margolis group to object to the [fol. 214] allowance of his claims. Notice of a hearing on said objections was given by the Examiner to claimant, to Louis R. Patur, Esq. and to other parties in interest.

Seymour Forman testified that he had known Malakoff since 1938 and that in the course of his acquaintanceship with Malakoff had engaged in various business ventures with him. These business ventures included loans of money to Malakoff from time to time. Forman received Stock Certificate No. 49 from Malakoff on March 12, 1953. This stock certificate, as heretofore stated, was issued in the name of John Malakoff and was endorsed over to Seymour Forman by John Malakoff. There is no date on the endorsement but the certificate is dated the 12th day of March 1953 and is signed by John Malakoff as President and Jerome Fried as Secretary. The stub for Stock Certificate No. 49 reads as follows: "Issued to John Malakoff Held as security void 3/12/53." The word "void" is written over the date and at the bottom thereof appears the following in pencil "Harry Forman now". The initials HB appear alongside of the word "out" which is crossed out in pencil, the word "security" appears in ink at the top of the stub and the stub seems to indicate that the certificate was written originally for 5 shares and then increased to 15. No explanation was offered as to the significance of the markings on the stub.

When Forman received the stock certificate on March 12, 1953, he signed a paper written out by Malakoff, which was signed by both Forman and Malakoff. This paper recited that Malakoff had given to Seymour Forman Agt. fifteen shares of Nazareth stock to be held as security for $15,000 [fol. 215] loaned by Seymour Forman Agent and evidenced by three promissory notes for $5,000 each of Wales, Ambassador and Nazareth. This paper also stated that Forman had received the stock, that the shares were to be returned when the notes were paid and were not saleable or transferable.

Forman testified that Malakoff asked him for a loan of $5,000 for Nazareth on March 12, 1953 and that Forman gave him the money and received a note in return. Claimant produced a promissory note of Nazareth by John Malakoff, President for $5,000 dated March 12, 1953 payable on July 13, 1953 to Seymour Forman at the Second National Bank, Nazareth, Pennsylvania. This note was endorsed by John Malakoff individually and appears not to have been paid when it became due. Forman claimed that he gave Malakoff $5,000 in cash. This cash, he said, was obtained as follows: A $1900 check was cashed at the Marine Midland Trust Company, he had $1600 in cash with him and he was given a bonus of $500 each on his Nazareth loan and for extending $5,000 loans to Ambassador and Wales. Thus the actual cash claimed to have been advanced by Forman to Malakoff at the time was $3,500.

Claimant produced a bank statement of the Marine Midland Trust Company on an account in the name of Seymour Forman Agent showing the withdrawal of $1900 on March 13, 1953. When the Nazareth note became due Forman instituted an action in the New York City Court against Malakoff and Nazareth because the note was not paid. Nothing was done against Nazareth thereafter because of the filing of the reorganization petition.

[fol. 216] According to Forman, he made a loan of $5,000 to Ambassador Estates on August 28, 1952. This loan was made in the form of a check of Seymour Forman Agent payable to the order of the Ambassador Estates, Inc. drawn upon the Marine Midland Trust Company. This check was endorsed Ambassador Estates, Inc. and was deposited in

the Corn Exchange Bank Trust Company. Forman testified that he received a promissory note from Ambassador Estates, Inc. in connection with the loan. This note was payable on March 12, 1953. When it became due Malakoff stated that he could not pay it and this note was destroyed and a new note dated August 28, 1952 payable July 3, 1953 was given by Ambassador Estates, Inc. to Forman. The note produced by Forman, which was never paid, was signed Ambassador Estates, Inc., John Malakoff, President, was dated August 28, 1952 and was payable to the order of Seymour Forman Agent on July 3, 1953. This note was endorsed personally by John Malakoff. Forman said that he received a bonus of $250 in cash from Malakoff when he made this $5,000 loan to Ambassador Estates, Inc.

Forman further testified that he made a $5,000 loan to Wales Properties Inc. on August 28, 1952 in the form of a check of Seymour Forman Agent drawn upon the Marine Midland Trust Company. This check was endorsed Wales Properties, Inc. and was deposited in the Irving Trust Company. Forman produced a promissory note of Wales Properties, Inc. which he said he received from Malakoff on March 12, 1953 to take the place of a note for $5,000 payable March 12, 1953 which had been given to him on August 28, 1952. This note is signed Wales Properties, Inc., John Malakoff, President, and is payable to Seymour Forman [fol. 217] Agt. on July 3, 1953. This note was endorsed personally by John Malakoff. Forman said that he received a bonus of $250 from Malakoff either in cash or by check in connection with this loan.

Forman contends that no part of the three $5,000 loans was ever repaid to him. Forman was confronted with eleven promissory notes for $300 each payable monthly commencing with January 1952 signed by John Malakoff Agent to the order of Yvette B. Forman and he testified that these notes were part of a larger series, the first eleven of which (probably for $100 each) were paid by Malakoff. Forman said that he received those payments as well as payment of the notes which were produced but that these payments covered a completely different loan which was made to Malakoff on January 22, 1951.

Claim No. 15 is based upon the Nazareth promissory note for $5,000 dated March 12, 1953 payable July 13, 1953. This promissory note is also part of the consideration for the transfer of Certificate No. 49 by Malakoff to Forman. The claims may therefore be regarded as alternative claims. If Stock Claim No. 8 is disallowed Forman stands upon his creditor's claim No. 15. If creditor's claim No. 15 for $5,000 is disallowed it may be possible for Stock Claim No. 8 to be allowed, depending upon the reason for disallowance of Stock Claim No. 15. There is some doubt as to whether Seymour Forman advanced any moneys to Malakoff on March 12, 1953. Forman has testified that he advanced $3,500 and the promissory note of Nazareth for $5,000 creates a presumption that some moneys were actually ad- [fol. 218] vanced. There is nothing in the record to refute Seymour Forman's positive assertion that he gave Malakoff $3,500 in exchange for the $5,000 note. It therefore must be assumed that the consideration for the issuance of the note was $3,500. However, there is nothing in the record to support a finding that any part of this $3,500 reached Nazareth. The money was given to Malakoff in cash and beyond that it has not been traced. Therefore claim No. 15 standing alone should be allowed only to the extent of $3,500.

The next question is whether Seymour Forman is entitled to Stock Certificate No. 49 or for any shares of stock in Nazareth. His claim to the stock rests upon the agreement of March 23, 1953 signed by Malakoff and Forman. It is doubtful that the promissory notes dated August 28, 1952 of Wales Properties, Inc. and Ambassador Estates, Inc. payable to the order of Seymour Forman Agt. on July 3, 1953 were actually given to Seymour Forman by Malakoff on March 12, 1953, as Forman has testified. The evidence as a whole supports the conclusion that these two notes were given to Forman by Malakoff on August 28, 1952 when the $5,000 loans were allegedly made to Ambassador Estates, Inc. and Wales Properties, Inc. Forman has admitted that he actually advanced a total of only $9,500, although it is a fair assumption that the bonuses exceeded $500. In any case, whether the notes were given on August 28, 1952 or

March 12, 1953 does not seem to be material. The Ambassador and Wales notes were not due on March 12, 1953 but as a condition of the $3500 loan to Nazareth, it is clear that Forman insisted upon getting security for the Ambassador and Wales notes as well as the Nazareth note. The security [fol. 219] consisted of Certificate No. 49 for 15 shares of Nazareth stock. Malakoff had endorsed the Ambassador and Wales notes and therefore was liable to Forman if they were not paid.

Viewing the March 12, 1953 transaction in the light most favorable to Forman, he received 15 shares of Nazareth stock for $13,000. Upon the assumption that Malakoff was in complete control of the stock of Nazareth and that it was immaterial whether the consideration passing to him for Nazareth stock was a present or antecedent one, it may be said that the sum of $13,000 constitutes the net fair value of the investment of Seymour Forman in Nazareth. The alternative creditor's claim No. 15 must of course be disallowed.

72. Claim No. 25 was filed by *Eskandar Manoochehrian*. This claim is based upon Certificate No. 36 for 14 shares of Nazareth stock dated the 2nd day of February 1953 and Certificate No. 63 for 6 shares of Nazareth stock dated the 10th day of April 1953. The stated consideration for this stock is as follows: claimant lent $20,000 to Wales Properties, Inc. on November 14, 1952. On November 18, 1952 claimant received the sum of $33.33 from Malakoff. On December 10, 1952 Malakoff agreed to repay the said sum of $20,000 in seven weekly payments of $2,857.14 each, commencing December 17, 1952. Malakoff paid claimant $2,857.14 on December 17, 1952 and $2,857.14 on December 26, 1952. No further payments were made to claimant on this indebtedness. On February 2, 1952 Malakoff delivered to claimant Certificate No. 36. Claimant refused to accept [fol. 220] fourteen shares in full payment of the indebtedness. On April 10, 1953 Malakoff delivered to claimant Certificate No. 63. Claimant agreed to accept 20 shares of Nazareth stock in payment of the indebtedness to him from Wales Properties, Inc. No attorney in fact was designated in the proof of claim.

Objections to the allowance of Claim No. 25 were filed by the debtor and by the Margolis group. The debtor alleged that Malakoff had no title to the stock that was transferred to claimant and that no consideration passed to Nazareth. The debtor also asserted a counterclaim against claimant in the sum of $20,000. The Margolis objections also claim that neither the debtor nor Malakoff received any consideration for the stock and that the stock issued to claimant was in excess of the authorized stock. Claimant filed a reply to the debtor's objections by Solomon Gilbert, Esq., 295 Madison Avenue, New York. Notice of a hearing on said objections was given by the Examiner to claimant, Solomon Gilbert, Esq. and the attorneys for the debtor and the Margolis group.

Claimant made a loan of $20,000 to Wales Properties, Inc. by check dated November 14, 1952. This check was deposited in the account of Wales Properties, Inc. in the Irving Trust Company. Claimant was able to make this loan because Malakoff had gradually repaid a prior loan to him for $10,000 by two checks for $2500 each, one dated November 6, 1952 and the other November 12, 1952 and by one check for $5,000 dated November 14, 1952. Malakoff did in fact receive a check for $10,000 from Manoochehrian [fol. 221] dated October 11, 1952 and drawn upon the Irving Trust Company. This check was endorsed John Malakoff, John Malakoff, Agent and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Manoochehrian received a check dated November 6, 1952 for $2500 of John Malakoff, Agent and a check for the same amount of John Malakoff, Agent dated November 12, 1952. Both of these checks were drawn upon the Corn Exchange Bank Trust Company. The Manoochehrian records show that he also received a check for $5,000 from John Malakoff on November 14, 1952. Actually this $5,000 payment was a check for that amount dated November 14, 1952 on the account of Wales Properties, Inc. drawn on the Irving Trust Company.

When Manoochehrian gave Malakoff his check for $20,000 on November 14, 1952 he received a promissory note for that amount of Wales Properties, Inc. payable on or before January 20, 1953. This note was endorsed as follows:

"John Malakoff, Ambassador Estates, Inc., John Malakoff, Pres., Nazareth Fair Grounds & Farmers Market, John Malakoff, Pres., Baltimore Realties Inc., John Malakoff, Pres."

On or about November 18, 1952, Manoochehrian received a check from Malakoff for $33.33. He claimed that apart from the $10,000 returned to him by Malakoff, this check for $33.33 represented the only moneys received by him from Malakoff prior to December 10, 1952. The records of Manoochehrian indicate that this check for $33.33 represented interest but there is no indication as to the amount of the loan to which it applied.

[fol. 222] Manoochehrian testified that he had a conversation with Malakoff on December 10, 1952 at which time they discussed repayment of the $20,000 loan to Wales Properties, Inc. In this conversation an agreement was reached under which Malakoff was to repay the $20,000 in seven weekly payments of $2,857.14 each, commencing December 17, 1952. This understanding was reduced to writing and was signed by Malakoff.

Thereafter Manoochehrian received two payments of $2,857.14 each. One payment was made on December 17, 1952 and the other on December 26, 1952. Both of these payments were made by checks of John Malakoff Agent drawn upon the Corn Exchange Bank Trust Company. The second check was certified. According to Manoochehrian, he did not receive any further payments against the $20,000 loan to Wales Properties, Inc. Manoochehrian also testified that he received post-dated checks from Malakoff on December 10, 1953 and that the unpaid checks were returned to Malakoff later when he received Nazareth stock.

When the third check was due, so Manoochehrian testified, Malakoff told him not to deposit it since there was no money in the account. This was some time in the beginning of 1953. Malakoff told Manoochehrian that instead of meeting the post-dated checks in accordance with the agreement of December 10, 1952, he would prefer to give Manoochehrian shares in Nazareth and Manoochehrian agreed to drive to Nazareth to inspect the market. Manoochehrian went to Nazareth to inspect the market and there he saw Jerome Fried. Fried's sister was married

[fol. 223] to Manoochehrian's brother. After visiting Nazareth and later in the month of January, Manoochehrian visited Malakoff at his office. Malakoff then told him that he still did not have the money to repay the debt and that he would give him stock in Nazareth at the rate of $1,000 per share, which was the price at which such stock was being sold. Manoochehrian agreed to accept fourteen shares of Nazareth stock for which he received Stock Certificate No. 36.

Stock Certificate No. 36 is regular on its face. The stub for that certificate shows that it was issued to Eskandar Manoochehrian but also has thereon the following legends "security" and "John Malakoff—security". The stub therefore tends to contradict claimant's testimony that he received the stock certificate in satisfaction of the balance due on the $20,000 note of Wales Properties, Inc. In any case, there seems to be no question but that the stock certificate was actually issued in the name of Manoochehrian and delivered to him.

Manoochehrian testified that after receiving Stock Certificate No. 36, he heard that shares were being sold for $600 a share instead of $1,000 a share and he complained to Malakoff about having to pay $1,000 per share. As a result of his persistence, Malakoff agreed to give Manoochehrian another six shares, for which Manoochehrian received Stock Certificate No. 63. This certificate, so Manoochehrian testified, was received by him on April 10, 1953, the date the certificate bears. Manoochehrian said that when he received Certificate No. 63, Malakoff called Helen Bernstein into his office and told her that he was giving Manoochehrian six more shares of Nazareth stock and that [fol. 224] this cancelled out his debt to Manoochehrian.

Stock Certificate No. 63 is also regular on its face. The stub for this certificate is regular on its face and does not indicate that it was given to Manoochehrian as security. In fact, there are no restrictions, conditions or limitations of any kind on the stub. This stub therefore supports the testimony of claimant.

After receiving the stock certificates, Manoochehrian returned the unpaid post-dated checks to Malakoff. It is significant that these post-dated checks were all signed by

Malakoff and not by Wales Properties, Inc. Malakoff did not ask Manoochehrian to return the promissory note so Manoochehrian retained the same.

Either when Manoochehrian received the stock certificate for 14 shares or the certificate for 6 shares, Malakoff gave him a letter receipt for $16,000 dated November 14, 1952. The significance of this receipt is that it bears the same date as the date of the original loan to Wales, even though it was given to Manoochehrian in February or April of 1953.

On May 6, 1953 Manoochehrian received a check of John Malakoff dated May 1, 1953 for $177.78 drawn upon the Manufacturers Trust Company. According to Manoochehrian, this was the only money he received from Malakoff in 1953. The receipt of this check by Manoochehrian is reflected upon his records but there is no indication thereon as to what it represented. Manoochehrian testified [fol. 225-6] on cross-examination that this check was supposed to represent a dividend on Nazareth stock at the rate of 20% per annum. This amount was short of 20% on $16,000 for a full month and would seem to indicate that Malakoff actually owed Manoochehrian less than $16,000 at the time.

Some time in 1953, after Malakoff had given him the second stock certificate, Malakoff came to Manoochehrian's office and offered to sell him $700 or $800 worth of notes for a much smaller sum. Manoochehrian testified that he bought these notes for less than half the amount they represented and that subsequently he received payment for two of these notes. These notes were for $65 each and evidently were made by one Danciger. The remaining notes were not paid and thereafter Manoochehrian made a settlement with Danciger with respect thereto.

Manoochehrian joined with his brother, Manoochehr Manoochehrian, in transactions with Malakoff. He did not recall receiving anything from his brother which might have been received from Malakoff as a result of transactions with Malakoff. He did recall that in the beginning of 1953 a check for $3,000 was made out by his brother to the order of Malakoff and was endorsed by Malakoff and then given to him (Eskandar) and he deposited it in his bank. His

brother told him, however, that this was a mistake and did not represent a payment to Eskandar from Malakoff but was a payment of a debt from Manoochehr to Eskandar. It is odd that a payment by Manoochehr to his brother Eskandar should have been made through Malakoff but [fol. 227] there is no evidence to refute the explanation offered by Eskandar Manoochehrian.

Claimant testified that the $10,000 loan made by him to Malakoff in October 1953 was made without the receipt of any bonus, security or collateral. This testimony is difficult to accept but there is no evidence in the record to refute it.

Manoochehrian testified on cross-examination that the $20,000 check payable to Wales Properties, Inc. and dated November 14, 1952 was given to Malakoff for investment in a 69th Street parcel of property. That testimony contradicts the statement in Manoochehrian's claim that the $20,000 represented a loan to Wales Properties, Inc. Manoochehrian explained the contradiction by saying he hoped Malakoff would put the $20,000 into the 69th Street property and that when this did not materialize and he did not get his money back, Malakoff offered him shares in Nazareth which he agreed to accept.

Manoochehrian testified that he knew that Malakoff was President of Nazareth and assumed that he owned all the stock in that company. He admitted, however, that Malakoff did not tell him that he owned the corporation.

In April 1953 there was due to Manoochehrian from Malakoff the sum of $14,285.82. In fact, Manoochehrian testified that in January 1953 there was Fourteen Thousand some odd dollars owing to him from Malakoff and on February 2nd he received fourteen shares of stock valued at $14,000 in payment of the $14,000 debt.

[fol. 228] Alex Rosen testified that he found a memorandum among the effects of Malakoff which was received in evidence and read as follows: "Also paid Jan. 2, 1953— 2857.14 all 357.00 were paid in *cash*". Other than this memorandum, Mr. Rosen had no record, memorandum or evidence indicating any payment to Manoochehrian on January 2, 1953 of $2,857.14. Manoochehrian testified that he did not remember any transactions with Malakoff involving pay-

ment of $357, and that so far as he recalled he did not have any such transaction.

The transcript of Manoochehrian's bank account with the Irving Trust Company for January 1953 does not reflect the deposit therein of $2,857.14. It shows three deposits in January, one on January 12 for $1,000, another on January 14 for $3,000 and another on January 23 for $147.75. The sum of $2,857.14 might have been included in the deposit of $3,000 on January 14 but that does not seem to be important. Manoochehrian testified that he received two checks from John Malakoff in December 1952, each in the sum of $2,857.14, one on December 17 and the other on December 26, but the transcript indicates that only one deposit in that amount was made in December 1952. Manoochehrian could easily have otherwise disposed of the sum of $2,857.14 received from Malakoff on January 2, 1953 and in the light of all the evidence it seems reasonable to believe that Malakoff would not have indicated on the memorandum that he had paid Manoochehrian $2,857.14 in January unless he had actually done so.

[fol. 229] Manoochehrian testified that he entered into an arrangement to sell his stock to Jerome Fried, his brother's brother-in-law, for $12,500. He said that this arrangement was later changed so that Manoochehrian remained half owner of the twenty shares and the purchase price was reduced from $12,500 to $12,000. The sale of Manoochehrian's stock to Fried is, however, irrelevant in connection with the issue as to the validity of the stock and the status of the holders thereof.

Manoochehrian advanced the sum of $20,000 to Wales on a note endorsed by Malakoff. Three payments of $2,857.14 were made to him in reduction of this loan. He also received one interest check for $33.33 and another for $177.78. The total amount therefore returned to Manoochehrian was $8,782.53. Therefore the sum of $11,217.47 constitutes the net fair value of Eskandar Manoochehrian's investment in Nazareth.

73. Claim No. 38 for 6 shares of Nazareth stock was filed by *Ann Rosen*. This claim is based upon Certificate No. 27 dated the 2nd day of February 1953. This claim is

stated to be in the sum of $6,000 or in the alternative for 6 shares of the debtor's stock. The stated consideration in said claim is $6,000 paid to Malakoff for 6 shares of the debtor's stock at the rate of $1,000 per share, which consideration was paid in or about the month of December 1951 and January and March 1952. No attorney in fact is designated in the proof of claim.

[fol. 230] Objections to the allowance of Stock Claim No. 38 of Ann Rosen were made by the debtor on the ground that Malakoff had no title to the stock that was transferred to claimant and on the further ground that no consideration passed to the debtor. As a counterclaim, the debtor prayed that it recover the sum of $6,000, the unpaid subscription price, in the event the stock claim of Ann Rosen was sustained. A reply to the counterclaim was filed by claimant and in behalf of Robert H. Davidson, Assignee, by Melvin L. Robbins, Esq. Notice of a hearing on the said objections was given by the Examiner to claimant, Melvin L. Robbins, Esq. and Alex L. Rosen, Esq., attorney for the debtor.

Ann Rosen testified that she first met Malakoff in the latter part of 1951 or the early part of 1952. She was introduced to him by Mrs. Rhea Hirschkorn who had told her that she knew of a man (Malakoff) who had an investment whereby she could get 20% on her money. Thereafter Mrs. Rosen gave Mrs. Hirschkorn a check with which to purchase six shares of Nazareth stock in piecemeal fashion. Mrs. Hirschkorn took the check to Malakoff and brought back a receipt. Mrs. Rosen did not speak to Malakoff personally or by telephone before she gave Mrs. Hirschkorn the check.

Claimant produced a check for $3,500 payable to Malakoff dated December 20, 1951 and drawn upon the Corn Exchange Bank Trust Company. She stated that this was the check that was sent to Malakoff through Mrs. Hirschkorn. This check was endorsed John Malakoff, John Malakoff Agt. [fol. 231] and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Mrs. Rosen received a receipt for $3,500 signed by John Malakoff dated December 20. This receipt was the usual long form receipt and indicated that she had a 3.5 200ths interest in the

market. After John Malakoff's signature he wrote "There are a total of 200 shares issued".

After investing $3,500 in Nazareth stock, claimant received a dividend check for $19.44 purportedly covering dividends for the month of December 1951. This check was signed by John Malakoff Agent, was dated January 2, 1952 and was drawn upon the Corn Exchange Bank Trust Company. Over the endorsement of Ann Rosen appeared the legend "Re-Nazareth." This check actually represented a dividend on Ann Rosen's investment of $3,500 for one-third of the month of December.

Some time after receiving the first dividend check, Mrs. Rosen gave Mrs. Hirschkorn another check for investment in Nazareth stock. Actually this was at or about the time of the receipt of the dividend check for $19.44 because Ann Rosen issued a check for $1500 to Malakoff dated January 4, 1952 drawn upon the Corn Exchange Bank Trust Company. This check was endorsed John Malakoff, John Malakoff Agt. and was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Mrs. Rosen received a receipt for this $1500 signed by John Malakoff and dated January 7, 1952. This was the usual long form receipt. Although this receipt simply acknowledged the receipt of $1500 after Malakoff's signature at the bottom thereof he wrote the following: "Up to date you now have 5/200th of Nazareth."

[fol. 232] Claimant then testified that after getting the receipt for the $1500, she went to Malakoff's office with Mrs. Hirschkorn when she was introduced to Malakoff for the first time. On meeting Malakoff he told her that she was lucky to be able to buy shares in the market and that soon the shares would sell for $1500. He also told her that if she intended to buy any more shares, she should do so in a hurry. Mrs. Rosen told Malakoff that she had originally intended to take six shares and she would give him a check for the balance of $1,000 as soon as she was able to do so.

A dividend check for $83.33 was received by Mrs. Rosen around the first of February 1952. This check represented the monthly return on an investment of $5,000 at 20% per annum.

Claimant also received dividend checks of John Malakoff, Special for $83.33 in March and April 1952. These checks were drawn upon the Corn Exchange Bank Trust Company.

According to claimant, some time in March 1952 she gave Malakoff another check for investment in Nazareth. This check was for $1,000 and was handed to Malakoff personally in his office. The check was dated March 5, 1952, was drawn upon the Corn Exchange Bank Trust Company and was endorsed John Malakoff, John Malakoff Agt. It was deposited in the Malakoff Agent account in the Corn Exchange Bank Trust Company. Claimant did not receive a receipt at the time this $1,000 check was given to Malakoff but later received the usual form receipt dated April 20, 1952. Although this receipt covered $1,000, at the bottom thereof after Malakoff's signature he wrote the following: "P.S. You now are in possession of 6/200th or an investment of $6,000.00".

[fol. 233] Commencing with May 1952 and continuing through January 1953 claimant each month received a check for $100 of John Malakoff, Special. All of these checks except the June check were produced and marked in evidence. There is no doubt that claimant received a dividend check for June. Each check represented the monthly payment due on an investment of $6,000 yielding a return of 20% per annum. Claimant also received a check for $100 from Malakoff in April 1953 and a check for the same amount in May 1953. Both of these checks were drawn upon the Manufacturers Trust Company. In addition, claimant received a check for $100 in February 1953 and a similar check in March 1953 of Nazareth drawn upon the Second National Bank of Nazareth, Pennsylvania. Thus claimant in all received a total of $1,569.43 in so-called dividends.

Some time in 1953, Mrs. Rosen received Stock Certificate No. 27 from Malakoff. This stock certificate is regular on its face. There is nothing on the stub for this certificate that indicates that it was issued subject to any qualifications, restrictions or conditions.

Mrs. Rosen had other transactions with Malakoff, apart from the Nazareth transaction. She made investments in

the Hotel Wales and Hotel Margaret through Malakoff and a number of checks passed from claimant to Malakoff and from Wales Properties Inc. and Malakoff to claimant. Claimant also received a number of promissory notes from [fol. 234] John Malakoff and Ambassador Estates, Inc. which apparently were never paid. These transactions had no direct connection with Nazareth so far as the record discloses. By letter dated April 29, 1952, John Malakoff acknowledged that he had received $18,000 from Ann Rosen which made her a one-fourth owner of Hotel Wales leases. In this letter he stated that she would receive 20% on her investment in monthly installments of $300 guaranteed by Malakoff.

In a letter dated December 15, 1952 signed by Malakoff, he acknowledged her 25% interest in the issued stock of the corporation operating the Wales Hotel for which she had paid him $18,000. He also stated that he was holding for her account two shares of stock in the corporation operating the Hotel Margaret, for which he had received $2,000, and he acknowledged an additional indebtedness to her of $22,000 for moneys advanced from time to time.

In the said letter of December 15, 1952, Malakoff acknowledged two deposits against certain specified deals, one of $1250 and the other of $500, and he stated that he was holding for the account of claimant six shares in the operating company of Nazareth Farmers Market for which he had received the sum of $6,000. In a letter dated June 1, 1953 sent to claimant by Malakoff, which he asked claimant to sign and return, Malakoff, among other things, stated that claimant then had six shares of Nazareth, six shares in Hotel Wales, $10,000 cash (note); $8,000 notes of $500 each, and that all other items had been paid. Mrs. Rosen did not sign this receipt and return it to Malakoff as requested.

[fol. 235] Claimant's endorsement appears on check for $1,000 of Nazareth dated February 19, 1953 and drawn on the Second National Bank. Mrs. Rosen testified that she cashed this check for Malakoff. Claimant's endorsement also appears on a check of Nazareth for $1,000 dated February 11, 1953 drawn upon the same bank. According to Mrs. Rosen, Malakoff needed money and she endorsed

these checks so he would be able to cash them at her branch of the Corn Exchange Bank Trust Company.

Mrs. Rosen said that she did not make loans to Malakoff although she would cash checks for him and enter into exchange transactions with him. At times he would give her post-dated checks of Nazareth. When she was examined before trial, Mrs. Rosen testified that she loaned money to Malakoff which he returned in some instances and in other instances did not. She said that she loaned him money also in connection with Nazareth. She also testified that Malakoff would give her a post-dated check and when the check was put through for collection, it would come back for insufficient funds.

Mrs. Rosen produced debit memos from the Corn Exchange Bank Trust Company reflecting the charging to her account of three protested checks of Nazareth drawn on the Second National Bank of Nazareth. One debit memo was dated March 25, 1953 in the amount of $914.38 and covered a check of $912.50 plus fees of $1.88. A second memo was likewise dated March 25, 1953 and covered a check for $1,898.50 plus fees of $1.88 making a total of $1900.38. A third memo was for $2002.13. This memo was dated March 4, 1953 and covered a check for $2,000 plus [fol. 236] fees of $1.88 and a charge of 25¢. Mrs. Rosen further testified that when Malakoff needed money with which to pay dividends to the Nazareth investors he would give post-dated checks to her. She would then lend him the money which he would deposit in his account. This money was obtained by her through the cashing of U.S. Government bonds worth $15,000 or $20,000.

A check for $3,200 of Nazareth drawn on the Nazareth National Bank dated January 20, 1953 was made payable to Ann Rosen and was signed by Jerome Fried. This check was endorsed by Ann Rosen and seems to have been deposited in her account in the Corn Exchange Bank Trust Company on January 20, 1953. Claimant did not remember the circumstances under which she received this check for $3,200. It appears, however, that on January 20, 1953, Ann Rosen drew a check for $3,200 payable to herself and this check was charged to her account in the Corn Exchange Bank Trust Company on January 21, 1953. Claimant re-

membered that the $3,200 debtor's check represented an exchange item. This testimony is supported by the transcript of the Nazareth bank account in the Nazareth National Bank and Trust Company. That transcript reflects a deposit of $3,200 on January 23, 1953 and a withdrawal on the same date.

Claimant also endorsed a Nazareth check for $4,200 dated December 30, 1952 drawn on the Nazareth Bank and Trust Company and payable to the order of "Special". This check was deposited by claimant in her account in the Corn Exchange Bank Trust Company on December 30, 1952. Claimant then drew a check for $4,200 on her account [fol. 237] in the Corn Exchange Bank Trust Company on the same day. This check was made payable to herself and she endorsed the same. On December 29, 1952 a deposit of $4,200 was made in the Nazareth bank account and a charge of $4,200 was not made against the account until January 6, 1953. It is thus clear that so far as Ann Rosen was concerned, the check for $4,200 of Nazareth was an exchange item, and nothing more.

The dealings between Malakoff and Ann Rosen were complex. It is impossible to relate each check payable to Ann Rosen or endorsed by her to a check of Ann Rosen payable to Malakoff or for his account. On the entire record, however, it is not possible to make a finding that Ann Rosen received from Malakoff more than she gave him, much less a finding that Ann Rosen received any money from Nazareth to which she was not entitled. The testimony of Ann Rosen is contradictory. Nevertheless, she engaged in so many transactions with Malakoff that her contradictions at least can be understood. There is a failure of adequate evidence of usury in the transactions of Ann Rosen with Malakoff, even assuming that usury would be relevant to the issue as to the right of Ann Rosen or her successor in interest to stock in Nazareth.

That Ann Rosen invested $6,000 in Nazareth is perfectly clear. That the sum of $1,569.43 was returned to her in so-called dividends is equally clear. The evidence is far from preponderating that any additional moneys were returned to Ann Rosen by Malakoff. On the contrary, all of the credible evidence indicates that Ann Rosen still re-

tained her investment in Nazareth at the time Malakoff sur- [fol. 238] rendered control of the business to present management. Accordingly, the sum of $4,430.57 constitutes the net fair value of the investment of Ann Rosen in Nazareth.

There is testimony that Ann Rosen assigned her claim to Robert H. Davidson for $5,500. Checks covering the consideration for such assignment were offered and received in evidence. The assignment of the claim, however, is irrelevant to the question as to the right of Ann Rosen or her assignee to be classified as stockholders of Nazareth and if so, to what extent.

74. Claim No. 15 for 35 shares of Nazareth stock was filed by *Frederick Katzenell*. This claim is based upon Certificates No. 51, 52, 53, 54, 55, 56 and 57 for 5 shares each, all dated the 2nd day of March 1953. No consideration for the said stock is stated in the proof of claim. Katzenell makes claim for the value of said stock. No attorney in fact is designated in the proof of claim.

Objections to the allowance of Katzenell's Stock Claim No. 15 were filed by the debtor and by the Margolis group. The debtor's objections are as follows: (1) that Malakoff had no title to the stock that was issued to claimant, (2) that no consideration passed to Nazareth in which case claimant would be indebted to the debtor in the sum of $35,000, the unpaid subscription price, (3) that if claimant paid $2,000 to Malakoff as President of the debtor as and for his subscription to 35 shares of capital stock, claimant [fol. 239] is indebted to Nazareth for the balance of the purchase price, to wit, $33,000, (4) that Katzenell is not the owner of the stock certificates for which he filed claim and that the stock was given to Katzenell as security for a debt owed personally by Malakoff to Katzenell. The Margolis objections charge that at no time did Katzenell become the owner of the 35 shares, that the delivery of such shares by Malakoff to Katzenell was without consideration to either Nazareth or Malakoff and that the 35 shares of stock do not constitute an obligation of Nazareth, are null and void, and should be delivered up and cancelled. These objections also allege that the stock acquired by Katzenell was in excess of the authorized issue of 200 shares; that the

consideration for the 35 shares was actually $25,200 and not $35,000 as agreed upon, so that 10 shares of stock should be cancelled in any event; and that the objections interposed by the debtor to the allowance of the Margolis claims should be deemed to have been interposed to the allowance of the Katzenell claim. Katzenell filed an answer to the objections of the Margolis group and Katzenell by Melvin L. Robbins, Esq. filed a reply to the counterclaims asserted by the debtor in its objections. Notice of a hearing on the said objections was given by the Examiner to Katzenell, and Messrs. Gothelf, Robbins, Margolis and Rosen.

Katzenell testified that he was introduced to Malakoff by Seymour Forman in the beginning of 1950. On September 4, 1951, according to Katzenell's first testimony, Malakoff showed him financial statements on the Farmers Market which reflected an income of over $70,000, expenses [fol. 240] about $40,000 with a net profit of about $30,000. Malakoff told Katzenell that a quarter of the market could be purchased by Katzenell and that he was going to issue shares at a later time, about 200, of which Katzenell would have 50.

Katzenell was also told that Malakoff had purchased the market from Ed. Malakoff and that the first portion thereof was on the basis of $64,000 representing a quarter interest.

On September 4, 1951, so Katzenell testified, Malakoff in his presence wrote out a receipt to Frederick Katzenell and Margareth Katzenell which was signed by Malakoff and read as follows: "I hereby confirm receipted amount totalling Thirty Thousand ($30000.00) for 1/4 share of Farmers Market at Nazareth (50 shares of total 200 issued). This letter receipt was produced and marked in evidence.

Katzenell said that he gave $2,000 to Malakoff at the time the receipt was made out and that the balance represented $28,000 which was then owing by Malakoff to Katzenell. Katzenell produced a check for $2,000 signed by him drawn on the National City Bank of New York dated September 4, 1951 made payable to the order of John Malakoff Agt. This check was endorsed John Malakoff, John Malakoff Agt. and was deposited in the Malakoff Agent account in the

Corn Exchange Bank Trust Company. Over the endorsement of John Malakoff appears the following legend: "Re Nazareth total 30000."

Later Katzenell testified that in April or May 1951 he gave Malakoff a check for $2,500 for the purchase of a one-fourth interest in one-fourth of a contract to acquire the Nazareth market. He said that subsequently and in [fol. 241] September 1951 he purchased the $30,000 interest or 50 shares in the market. He also testified that he arrived at the $30,000 figure as the amount owing to him by Malakoff by adding all the moneys he had advanced to Malakoff up to September 1951 and crediting Malakoff with any profit that had been returned to him and then subtracting all the moneys representing return of capital. This computation left a balance of about $28,000 which, together with his check for $2,000, made up the total of $30,000.

Claimant further testified that the seven stock certificates, numbered 51 to 57 inclusive, were delivered to him on March 2, 1953 in Malakoff's office. These stock certificates are regular on their faces and each one is in the name of Frederick Katzenell. The stubs for these certificates, however, show that they were issued to John Malakoff. At the top of each stub appears the legend "security" handwritten in ink and under Malakoff's name appears the legend "security FK".

Katzenell testified that commencing in November or December 1951 he received by way of dividends on his Nazareth investment $500 per month. These dividends were given to him by Malakoff by check or in cash. His best recollection seems to be that the first dividend payment of $500 was made in December 1951 but this cannot be correct. He must have received a dividend payment of $500 on or about November 1, 1951, if not on October 1, 1951. If, as he claims, his deal with Malakoff was made on September 4, 1951 then under Malakoff's normal practice, Malakoff would have commenced paying dividends on or about October 1, 1951. In any case, it is reasonably cer- [fol. 242] tain that Katzenell received a $500 dividend payment in November 1951. The dividends from Nazareth, so Katzenell testified, continued until May 1953. During the latter period, however, he said that he received the reduced

amount of $350. He claims that he did not make a record of the dividends he received in cash from Malakoff in regard to the Nazareth Market.

The $500 dividend payments on Nazareth from Malakoff continued until September 1952. On September 2, 1952, Malakoff gave Katzenell a check for $400 and later that month cash in the amount of $100. Katzenell testified that in September 1952, he went to Malakoff's office and was given ten notes for $3600 each, so he claims, as security for his shares. Despite the fact that the notes aggregated $36,000 Katzenell said that his interest in Nazareth at that time was in the dollar value of $30,000. When he received these notes he reached an understanding with Malakoff that as each note was paid Katzenell would have 5 shares less in Nazareth. Malakoff, so Katzenell testified, paid three of the ten notes or a total of $10,800.

These notes, which were dated September 9, 1952, became due on October, November and December 9, 1952. The reason each note was $3600 instead of $3,000 was to compensate Katzenell for his loss of dividends on his shares of stock in Nazareth. His claim is that he received no dividends in October, November or December 1952. Katzenell discounted these notes with Simon Rosenkranz. Prior to the maturity date of the third note, that payable on December 9, 1952, Malakoff told Katzenell that he did not have enough money to pay that note. Katzenell gave Mala- [fol. 243] koff $1500 of his own money to add to $2,000 that Malakoff had in order that the note should be paid when presented by Mr. Rosenkranz. Malakoff returned $200 of the $1500 advance to Katzenell in January 1953, so Katzenell said but the actual amount must have been $250 as evidenced by check of John Malakoff, Special dated January 24, 1953 in that amount drawn upon the Corn Exchange Bank Trust Company. Katzenell's deposit indicates that this $250 payment applied against the $1500 loan.

Some time during 1952, Malakoff told Katzenell that he would not be able to pay the other seven notes. He said that starting with January, he would pay Katzenell dividends of $350 per month on the 35 shares of Nazareth stock still held by Katzenell. Katzenell produced portions

of six unpaid promissory notes of John Malakoff, Agent dated September 9, 1952, each in the sum of $3600. He did not produce the whole nor any part of the $3600 note which became due on January 9, 1953. Despite his testimony that he assisted Malakoff in meeting the December 9, 1952 note by advances to Malakoff of $1500 at or about that time, it is fair to infer from the testimony that the $1500 advance was made by Katzenell to Malakoff in connection with the note which became due on January 9, 1953.

The transcript of the account of Katzenell with the National City Bank of New York reflects two credits of $3600 each and one debit of that amount during December 1952. This transcript does not reflect a deposit of $1500 by Katzenell in his National City Bank account in December 1952. [fol. 244] Thus this account was enriched to the extent of $3600 during December 1952 and the conclusion is inevitable that this resulted from a payment made to Katzenell indirectly by Malakoff through Rosenkranz. Katzenell made a deposit of $3600 in the National City Bank which the bank acknowledged on December 15, 1952. This deposit represented a check of Simon Rosenkranz for $3600 dated December 13, 1952 drawn upon the Chase National Bank. On December 17, 1952, the sum of $3600 was debited to Katzenell's account in the National City Bank because the Rosenkranz check had been returned for insufficient funds. On the same date the National City Bank notified Katzenell that the $3600 had been recredited to his account presumably because Rosenkranz's check had been made good or had been honored by the Chase National Bank.

Katzenell received a note for $1500 of John Malakoff Agent dated January 9, 1953 and payable on February 2, 1953. This is consistent with Katzenell having given $1500 to Malakoff on or about that date and not prior thereto. It is also consistent with Katzenell having advanced this sum to Malakoff in connection with the $3600 note due on January 9, 1953. There would have been no reason for Katzenell to advance $1500 to Malakoff on or about January 9, 1953 to assist Malakoff to pay a $3600 note which it appears had already been paid in December 1952. Furthermore, it is significant that Katzenell did not or could not produce the $3600 note which became due on January 9,

1953. If the note had been paid, as appears to be the fact, Katzenell could not have produced the note. Katzenell did [fol. 245] lend Malakoff $1500 to enable him to meet the January 9, 1953 note. Of this amount, $250 was returned, according to Katzenell, and $1250 was never returned. Katzenell must be debited with $2350 in connection with his Nazareth investment, representing the difference between the face amount of the note and the unpaid balance to Katzenell on his advance of $1500 to Malakoff in connection therewith.

Presumably Katzenell received a $350 dividend check in January 1953. A check for $350 of Nazareth drawn on the Second National Bank of Nazareth was given to Katzenell for the February dividend but this check was returned for insufficient funds. Malakoff gave Katzenell another check and cash to make good this check.

On or about March 12, 1953 Katzenell received a check of John Malakoff, Special for $250 drawn on the Corn Exchange Bank Trust Company. This check was deposited by Katzenell in his bank account in the National City Bank with the notation thereon that it represented a payment on account of the March dividend on Nazareth. Katzenell also received $300 as Nazareth dividends on March 20, 1953. Katzenell received $350 in Nazareth dividends in April 1953. On May 25, 1953 Katzenell deposited the sum of $150 in his bank account and on his duplicate deposit ticket stated that this represented the balance due on the May dividends from Nazareth. He also testified that he had previously received $200 for dividends in that month. According to Katzenell, he received no dividends after May 1953. Katzenell said that he returned the seven unpaid Malakoff notes to Malakoff in March 1953 when he received the Nazareth stock certificates.

[fol. 246] On the basis of Katzenell's testimony it is fair to conclude that commencing with November 1951 and continuing through September 1952, Katzenell received $500 each month from Malakoff as dividends on his Nazareth investment. It is also fair to say that commencing in January 1953 and continuing through May 1953 Katzenell each month received $350 in dividends from Malakoff. Thus Katzenell received $1,000 in dividends in 1951, $4500 in dividends in 1952 (excluding the additional payments of $600 each in

the October, November and December 1952 notes for $3600 each), and $1750 in 1953. His total dividends therefor were $7250.

Katzenell's 1951 income tax return does not reflect the receipt of any dividends although these dividends may have been included under other items or charged off against expenses. His 1952 income tax return reflects the receipt of dividends from Nazareth in the amount of $4950. Katzenell's 1953 income tax return lists $1300 as having been received during that year. The total received by Katzenell in 1952 or 1953, according to his income tax returns, was therefore $6250. On the basis of his testimony, during 1952 and 1953, Katzenell received a total of $6250.

In October 1951, Katzenell made a loan to Malakoff in the amount of $9200. This loan was represented by two checks, one dated October 11, 1951 for $5,000 of Katzenell drawn on the National City Bank of New York and the other for $4200 dated October 24, 1951 made by Katzenell and drawn on the National City Bank of New York. Both of these checks were endorsed John Malakoff, John Malakoff, Agent and were deposited in the Malakoff Agent account in [fol. 247] the Corn Exchange Bank Trust Company. Over the endorsement of John Malakoff on the October 11, 1951 check appears the legend "Re Nazareth". Malakoff gave Katzenell post-dated checks over a period of two or three months of $1,000 each (except that the last check was for $200) to repay the $9200 loan. All of these post-dated checks were paid.

Katzenell had numerous other transactions with Malakoff. These transactions started on or about the 2nd day of February 1950 and extended into 1952. The first transaction involved an advance of $1,000 made by Katzenell to Malakoff for investment in a Baltimore deal. Thereafter and for a good period of time, the dealings between Katzenell and Malakoff became very intense and complex. Many checks of John Malakoff were issued to or were endorsed by Katzenell. In addition, a good number of promissory notes of Malakoff were issued to the order of Katzenell and presumably were paid. On the other hand, a large number of Katzenell checks were issued to Malakoff or to or for his account or at his request in connection with the deals.

No useful purpose would be served by attempting to connect each check issued by Malakoff to or for the account of Katzenell with a check or checks issued by Katzenell to or for the account of Malakoff. Katzenell attempted such a reconciliation and to a substantial degree succeeded in doing so. In the last analysis, however, proof of an original [fol. 248] investment of $30,000 by Katzenell in Nazareth through Malakoff must rest upon testimony as to the aggregate of sums advanced by Katzenell to Malakoff or for his account plus profits thereon up to September 1954 less returns of capital and profits by Malakoff to Katzenell prior to that date. There is, of course, additional evidence that Katzenell did in fact have $30,000 invested in Nazareth from the fact of so-called dividend payments on that amount by Malakoff to Katzenell monthly commencing in November 1951 and continuing through September 1952.

The debtor points out contradictions in the testimony of Katzenell. For example, at one place in the record it appears that Katzenell testified that the $30,000 paid by him to Malakoff represented a balance due to him from Malakoff on September 4, 1951, whereas at another place in the record it appears that Katzenell paid the $30,000 to Malakoff in a lump sum. The debtor also calls attention to various erasures and changes which appear to have been made on checks given to Malakoff by Katzenell. The debtor also contends that the testimony of Katzenell is replete with falsehood and with fabrications. In addition, the debtor charges Katzenell with having participated in usurious transactions with Malakoff.

There is no doubt about the fact that Katzenell's testimony is replete with contradictions. The preponderance of the evidence, however, supports a finding that Katzenell did in fact invest $30,000 in Nazareth through Malakoff. No part of this $30,000 was received by Nazareth itself directly, or indirectly so far as the record here is concerned. [fol. 249] But it is clear that Malakoff owed Katzenell $30,000 on September 4, 1951 as a result of accumulated transactions or otherwise. Malakoff would not have paid Katzenell interest or dividends on a Nazareth investment from November 1951 through September 1952 if that money had not been invested by Katzenell in Nazareth. Katzenell

testified that he received the dividend payments of $500 monthly and his income tax returns reflect the receipt of dividends from Nazareth in 1952 and 1953.

Katzenell gave Malakoff $30,000 for investment in Nazareth. Whether the consideration was a past or a present one is unimportant. It also does not matter whether the Nazareth stock was actually given to Katzenell by Malakoff as security in the first instance. On September 4, 1951, Malakoff owed Katzenell $30,000 and agreed that he should have shares of stock in Nazareth either as security for the indebtedness or as the outright owner of such stock. Four notes for $3600 each of Malakoff's evidencing the $30,000 debt and including dividends (or interest) were paid by Malakoff. That totals $14,400. Katzenell is entitled to a credit of $1250 against this total representing the unpaid balance of the $1500 advance. That increases the debt to him from Malakoff to $16,850. Katzenell received eleven dividend payments of $500 each and five dividend payments of $350 each. These total $7250. Subtracting these so-called dividend payments, which in fact represented a return of capital, from the balance of $16,850 leaves a balance of $9,600. This sum of $9,600 constitutes the net fair value of the investment of Frederick Katzenell in Nazareth.

[fol. 250] During the course of this proceeding, Katzenell transferred all of his interest in and to the Nazareth stock in his name to Robert H. Davidson, subject, however, to a reservation of an interest in such stock under certain contingencies. The transfer of this stock is irrelevant to the question as to the propriety of the issuance of the stock in the first instance and the extent to which the holder of such stock should be permitted to participate in Nazareth.

The Issuance of Certificates, the Holding of Directors' and Stockholders' Meetings and Other Corporate Formalities.

75. The issuance of the first twenty shares of stock to Messrs. Zoloth and Soble and the sale of those shares, represented by certificates numbered 1 and 2, to Malakoff, are described earlier in this Report. On June 17, 1953 Malakoff endorsed over to the debtor itself the said stock certificates numbered 1 and 2. At the time of this endorse-

ment, Malakoff was hopelessly insolvent and the persons who were then acting as officers of the debtor were well aware of that fact.

76. No other certificates of stock were executed or delivered until February 1953. On or about February 2, 1953, Malakoff began issuing certificates to those who had made investments in Nazareth up to that time. A total of thirty-two certificates, aggregating one hundred forty-eight shares were issued, dated February 2, 1953. Eight more certificates, aggregating thirty-four shares, were issued, dated March 2, 1953. Ten other certificates aggregating eighty-two shares, bearing various dates from March 12, 1953 to April 28, 1953, were thereafter issued.

[fol. 251] 77. Almost all of the certificates, as heretofore stated, were regular on their face and were signed by Malakoff as President and Jerome Fried as Secretary of the company. Fried affixed his signature to the certificates in blank, acting at the direction of Malakoff. Malakoff alone completed the certificates and delivered them. There appears to be no relationship between the order in which the certificates were made out and delivered or the certificate numbers and the order in which the persons receiving them made their investment, except as to a very few who invested in Nazareth stock at the very end of Malakoff's control of that corporation. As indicated, most of the investors received from Malakoff a letter form of receipt which provided as follows:

> "You understand, of course, that all of the authorized stock of The Nazareth Farmers and Auction Market Inc. [sic] which owns the Market has been issued to me. Under our arrangements, I am obliged to you for a proportionate share of my earnings, dividends, liquidating or otherwise and profits from the Market as I receive them. For your information, I may say that the dividends have been declared at the rate of Twenty Per cent. (20%) per annum, payable monthly. It is expected that a dividend at the same rate will be paid on the first of each month. Additional dividends will be declared as income warrants.

"In the course of my management of the Market, I may cause to be issued to you ..... shares of my present stockholdings. On the other hand, I may cause the dissolution of the Corporation and arrange for the formation of a limited partnership and your ..... shares will be applied as your contribution with a corresponding proportionate interest. At all events, the method of operation is to remain solely in my hands • • • ."

[fol. 252] 78. Some of the investors, as also indicated above, received a different letter, handwritten or typed, which stated the number of shares issued to the investor, or the interest of the investor in Nazareth in terms of a fraction, the denominator of which was 200. Some of the letters stated that the monies received were to be held by Malakoff in "escrow", but the terms of the said escrow were not defined.

79. No share or stock transfer ledger or book was kept by Nazareth. The only record kept concerning the identity of stockholders and the shares held by them consisted of the entries on the stubs of the stock certificates.

80. Until May 1953 no meetings of stockholders were held. The minute book of Nazareth was not regularly kept. The first minutes of August 9, 1951 have been described earlier in this Report. In or about May 1953 a meeting was held in Malakoff's office. Present were Messrs. Katzenell and his attorney, Gothelf, claimant Kanter and his attorney, Harbater, claimant Hull, claimant Margolis and Malakoff. Katzenell had retained Gothelf to investigate Malakoff's business dealings. Gothelf had heard talk of over-subscriptions and other financial difficulties.

81. At the said meeting in Malakoff's office, it was ascertained that over three hundred shares of stock of the debtor had been issued. Claimant Kanter's attorney, Harbater, counted three hundred sixty-five shares. The corporate minute book was examined. It contained no minutes after 1951. Malakoff was granted an extension of time to re-acquire some of the issued stock.

[fol. 253] 82. At another meeting, held about one week later, the minute book was examined again. It contained minutes which had not appeared in the book at the earlier meeting. At this second meeting, Kanter's attorney, Harbater, counted two hundred ninety-three shares of stock outstanding.

83. Claimant Hull was evidently a director of the debtor from October 17, 1951 to June 4, 1953. In or about April or May of 1953, Malakoff informed Hull that there had been an over-subscription and over-issuance of the debtor's stock. At a meeting held on June 4, 1953, Hull resigned as director because he did not want to sign corporate minutes authorizing the issuance of two judgment notes for $5,000 each, payable to one Shongut, and another note for $3,600, payable to claimant Margolis. He did sign, as a director, certain minutes prepared subsequent to his resignation, where were predated.

84. Claimant Hull drafted minutes of a purported meeting, held to authorize the transfer of corporate stock at $75 per share to Malakoff. The said meeting, however, was never held. The said minutes were predated and purportedly reflected action taken at purported meetings, relating to the application of windstorm insurance proceeds to the issuance of one hundred eighty shares of the debtor's stock to Malakoff at $75 per share and to the judgment notes described above. The minutes were drawn between the middle and end of June 1953 and were signed by Hull and Fried.

85. At Gotheif's request, Harbater wrote a letter to the group of stockholders of the debtor requesting them to attend a meeting at Gothelf's office on May 22, 1953. Mala- [fol. 254] koff thereupon resigned as President of the debtor and Arnold Weinstein was elected President of Nazareth. Weinstein and claimants Margolis and Kanter were elected directors. On or about July 13, 1953, Alex Rosen, Esq., attorney for the debtor in the reorganization proceedings herein, was retained by the debtor. The institution of the present reorganization proceedings followed shortly thereafter.

The Payment of "Dividends" by Malakoff.

86. In connection with most of his sales of stock of Nazareth and of interests in the Nazareth venture, Malakoff represented to investors that their investments would yield 20% a year. The exact terms which he used, that is, whether he spoke of "dividends", "return", "net return", or some similar term, is not material. Whatever the specific term used by him, his representation to most of the investors was that they would earn 20% annually. He did pay a total of $36,268.02 to the claimants-stockholders.

87. The said payments cannot be terms "dividends" in the technical sense for a number of reasons hereafter stated in more detail. For the purposes of this Report, however, heretofore and hereafter they are referred to as "so-called dividends" or "dividends". Actually these dividends represented a return of capital.

88. The dividend payments by Malakoff commenced on September 1, 1951, when he started sending monthly checks to each investor who had theretofore made an investment in Nazareth through Malakoff. The amount of each monthly [fol. 255] check was one-twelfth of 20% of the investment. Except for the months of February and March 1953, practically all checks were drawn on one of three accounts of Malakoff, that of "John Malakoff", "John Malakoff, Agent", or "John Malakoff, Special". The monthly checks continued generally through May 1, 1953, although a few investors received dividends in June 1953. Most of the checks issued in February and March of 1953 were drawn on the debtor's account in the Second National Bank of Nazareth. The moneys deposited in this Nazareth bank account of the debtor were unrelated to its regular operations. In or about April, May and June of 1953 some of the dividend checks were dishonored by the drawee banks for insufficient funds. The dishonoring of these checks was one of the events which led to the meetings and the retention of and action by attorneys for several of the claimants, described above.

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89. The foregoing statement of facts and the findings and conclusions incorporated therein result from an analysis

by the Examiner of approximately 10,000 pages of testimony taken by this court on the objections of the debtor and the Margolis group to the allowance of the proofs of stock interest filed by the claimants-stockholders, and an analysis of the hundreds of documents which were marked as exhibits during the hearings on the objections. That statement of facts and the findings and conclusions incorporated therein accurately reflect, so far as the Examiner has been able to ascertain, the cause of the tangled and [fol. 256] confused history of the debtor. There is necessarily uncertainty in certain areas because of the death of Malakoff early in the course of the pending reorganization proceeding and the absence of any thorough examination of Malakoff on relevant matters while he was alive. Nevertheless, the facts are sufficient, in the opinion of the Examiner, to enable this court to resolve the question as to who are the stockholders of the debtor.

90. There are certain findings and conclusion of fact which the Examiner deems significant in determining the principles and rules of law which should be applied in the determination of the question as to who are the stockholders of the debtor corporation. Those findings and conclusions are beyond cavil and can be stated without qualification. They are as follows, with comments thereon where the Examiner deems such comments relevant or appropriate:

(1) Many of the claimants-stockholders engaged in other business transactions with Malakoff, both before and after their investments in Nazareth.

(2) Malakoff did not invest his own funds but obtained financing from others; he promoted and managed the transactions and took a percentage of the profit from each venture, as he determined it. Frequently he attempted to retain the principal amount put up by his investors for use in future ventures.

(3) Despite the number of shares promised by Malakoff to the investors in Nazareth, generally he promised and paid dividends at the rate of 20% per annum on the principal amount invested by each investor; his dividend payments were not related to the number of shares promised or

delivered to each investor. The amount of the dividend paid [fol. 257] by Malakoff to each stockholder and the time of payment thereof constitute a fairly accurate index of the amount of the investment of each such stockholder and the time or times of such investment.

(4) No dividends were declared at any time by the debtor, the Nazareth Fairgrounds & Farmers Market Inc.

(5) During the period commencing August 8, 1951 and ending June 30, 1952, Nazareth was in no position to pay dividends to its stockholders. In that period of time Nazareth sustained a net loss of $1,614.45. On June 30, 1952 on the basis of a capital investment of $1,500 there was a deficit in capital of $114.45. The book assets totalled $88,284.08 and the book liabilities amounted to $88,398.53. The principal assets on June 30, 1952, as reflected by the records, were as follows: Land $6,000; buildings less reserve $67,315.13 and improvements less reserve $11,606.26. The bank account showed a deficit of $371.40. The liabilities included loans payable to Malakoff of $68,092.92, first mortgage payable of $8500 and second mortgage payable of $8,000.

(6) During the period commencing July 1, 1952 and ending June 30, 1953 Nazareth was in no position to pay dividends to its stockholders. In that period the records reflected a net profit of $11,192.13 after the deduction of $11,811.78 representing insurance proceeds recoverable from losses applicable to expenditures incurred. The balance sheet reflected a bank deficit of $471.93 and total capital and surplus of $11,077.68. The insurance proceeds of $11,811.78 were carried as an account receivable from Malakoff, and this item was not deducted from loans payable to Malakoff of $68,442.92.

[fol. 258] (7) The dividends aggregating $36,268.02 paid to the stockholders, with the exception of some dividends paid to stockholders in February and March 1953, represented payments made by Malakoff from one of his personal bank accounts and did not come from Nazareth directly or indirectly. In February and March 1953, dividend checks were issued by Nazareth on the Second National

Bank of Nazareth, Pennsylvania. The deposits in and the disbursements from this bank account were unrelated to the regular operations of the corporation. The funds deposited were supplied by Malakoff.

(8) None of the payments made by any of the claimants-stockholders, representing investments in Nazareth, was made directly to the debtor. Almost all of the checks were drawn or endorsed over to Malakoff or Helen Bernstein. There is nothing in the record which establishes that any of these payments became an asset of Nazareth even indirectly.

(9) From the time of his first acquisition of his interest in Nazareth to the date of his resignation as an officer and director of and dissociation from the debtor, Malakoff, insofar as he and the investors and stockholders were concerned, disregarded the corporate entity and separate legal identity of the debtor corporation. He and all of the investors in Nazareth, the claimants stockholders herein, regarded Nazareth as a business venture, and ascribed little or no importance to the legal form which the venture took, or to the observance of the legal and other formalities and requisites of its corporate form.

[fol. 259] The Applicable Equitable and Legal Principles

91. One conclusion of fact and of law stands out above all others in the determination of who should be deemed to be the stockholders of the debtor and in what proportions—that not one of the thirty-six persons who have filed the proofs of stock interest which are the subject of this Report has a clear legal right to any of the shares which he or she claims. Whether Section 7 of Article XVI of the Pennsylvania Constitution, prohibiting the issuance of corporate stock without receipt by the corporation of valid consideration, is deemed to be or not to be self-executing, all of the issued shares of stock of the debtor herein are at least voidable.

92. The very objections by the debtor to the proofs of stock interest represent the debtor's exercise of its right

to void all of such shares. A typical objection of the debtor is that if a claimant contended that he subscribed to the capital stock of the debtor, that claimant did not pay a consideration to the debtor. Consequently the stock issued by the debtor to the claimant is either void or voidable. The factual objection that no consideration passed to the debtor must be sustained. That is true as to all stock claims. Consequently on the basis of the debtor's objections there would be no stockholders. The debtor's memorandum, however, takes an alternative position. The memorandum argues that Malakoff acquired an interest in Nazareth for the account of those who invested in Nazareth through him. Therefore, so the argument runs, an interest in Nazareth may be predicated only on the basis of a present [fol. 260] consideration given to Malakoff for the express purpose of acquiring an interest in Nazareth. This conclusion does not necessarily follow from the premise that Malakoff purchased an interest in Nazareth for the account of those who invested in Nazareth through him. Since Malakoff and not the debtor was the direct recipient of all consideration paid for all of the shares of stock issued to the claimants-stockholders, and no claimant has attempted to trace, from Malakoff to the debtor, the consideration he or she paid to Malakoff, none of the claimants-stockholders can prove that he acquired any of his shares in strict conformity with law.

93. As stated, the debtor itself and all of the claimants-stockholders recognize this fact. Correctly, they point out that escheat is neither required nor just, that some persons must be deemed to be validly stockholders of the debtor and some of the shares claimed deemed to have been validly issued, and that, therefore, equitable principles must govern in this Court of Bankruptcy in the making of such determination.

94. The difficulty and shortcoming in the position of each of the two principal contenders in the hearings before this court, the debtor itself and Davidson, is that each asks this court to do equity up to a certain point only. Each proclaims and asks that this court apply broad equitable principles, but at a certain point each retreats from the

very principles he invokes. Thus the debtor asks that all who gave Malakoff moneys for the purpose of investing in the debtor, regardless of what happened to the moneys and of when the payments were made and of when the certificates were issued, be deemed valid stockholders. The [fol. 261] debtor, however, returns to strict rules of law when it comes to those claimants-stockholders who received shares of stock in satisfaction of or as security for John Malakoff's prior personal obligations. With respect to this second class of claimants the debtor argues strict law —that where Malakoff had no title his transferee can secure no title, absent an estoppel against the debtor or the true owners. It is important to note that the administration of the debtor, that is its directors and officers, is at best a de facto one. The term "debtor" is misleading in the sense that those who make up the debtor cannot be known until the court has resolved the question of the ownership of the stock of the debtor.

95. Davidson divides the claimants-stockholders into four categories, according to the time or times when they made their investments:

(1) Investors prior to August 7, 1951, when Nazareth was incorporated;

(2) Investors after August 7, 1951 and prior to October 17, 1951, when Malakoff acquired legal title to the first twenty shares of the debtor's stock (then the entire outstanding legal issue);

(3) Investors after October 17, 1951 and prior to February 2, 1953, the earliest date of any issuance of stock and delivery of certificates to any of the claimants-stockholders; and

(4) Investors after February 2, 1953.

95. Davidson's position is that those claimants-stockholders in his first three classes who received from John Malakoff, for value to him, promises of shares in Nazareth, [fol. 262] should receive in Nazareth stock precisely what John Malakoff promised them, upon proof that Malakoff made such promises and that the claimants gave such value

therefor. This may be deemed to be, to the extent of the determination of who should be stockholders, if not to the extent of the determination of what proportions of stock they should have, an application of equitable principles. With respect to the claimants-stockholders in his class 4, Davidson adds to the requisites for stock ownership to be applied to those in the first three classes that of proof that the debtor is equitably estopped from the defense of lack of consideration for such stock. The added requisite is obviously inconsistent with broad equitable principles because its applicability hinges on a cut-off date, February 2, 1953, which was a purely arbitrary date fixed by Malakoff as the date when he first began issuing certificates to investors.

96. Both the debtor and Davidson depart from wholly equitable consideration in one further respect. Both take the position that over-issued stock is absolutely void and that those claimants-stockholders who subscribed for stock after the first 200 shares had been subscribed for may, in no event, be deemed to be stockholders of the debtor.

97. Who are the stockholders of the debtor is one question. What proportion of the stock each stockholder should be deemed to own is a second question. If equitable principles require the second question to be answered on the basis of the actual consideration paid rather than the circumstances, in the case of many investors purely fortuitous, of how many shares Malakoff promised each in- [fol. 263] vestor, the answer of Davidson to the second question represents a further departure from the equitable principles which he invokes.

98. As hereinbefore stated, this court is not confined to the positions and arguments of the conflicting parties. The Bankruptcy Act imposes upon the court the duty of affirmatively seeking and searching for a just, fair and legal determination of who are the debtor's stockholders, as well as of every other problem involved in formulating a fair, equitable and feasible plan of reorganization.

99. In the opinion of the Examiner, the debtor and Davidson are correct in urging that this court apply equitable

principles in the determination of who are the stockholders of the debtor and what proportions of its stock they hold. The Examiner, however, believes that they are incorrect in imposing the limitations and restrictions upon the application of equitable principles. The history of the organization and creation of the debtor and of the sale and issuance of the certificates of stock held by the claimants-stockholders, which must be described as confused, if not chaotic, not only permits but compels this court to apply the equitable principles which all of the parties before it urge upon it without the restrictions which Davidson and the debtor seek to impose.

The Equitable Principles to be Applied.

100. This court need go no further than the basic statement quoted above, from Pepper v. Litton, for two of the equitable principles to be applied:

[fol. 264] (1) "Substance will not give way to form."

(2) "Technical considerations will not prevent substantial justice from being done."

For the one further principle required it may adopt one of the simplest of the classical maxims of equity jurisprudence: "Equality is equity." See *Burchfield* v. *Bevans*, 242 F.2d 239 (10th Cir. 1957).

101. In the opinion of the Examiner, literal application of the three equitable principles stated above answers the basic question of who are the stockholders of the debtor and in what proportions, by solving each of the three problems subsumed by the one basic question. Those three problems may be stated as:

(1) whether the rights of the claimants-stockholders should be distinguished by reference to a classification such as that proposed by the debtor or by Davidson, or by any other classification;

(2) whether the number of shares awarded to each claimant deemed to be a valid stockholder is to be determined by reference to the amount of the considera-

tion he or she pays or by reference to the number of shares promised by Malakoff, as evidenced by the certificate or certificates each claimant holds;

(3) whether any of the shares of stock of the debtor should be deemed void and any of the claims of stock interest, accordingly, denied, because of over-issuance of shares.

[fol. 265]

Application of the Three Stated Equitable Principles.

102. The problem of classification of the claimants-stockholders is posed by the general requirement of law that a corporation receive "consideration" for stock applicable in Pennsylvania. Pa. Const. Art. XVI, Section 7. The classifications proposed by the debtor and by Davidson represent their answers to the problem of consideration. Applying the first stated principle of equity, that "substance will not give way to form", is not difficult. Unless some overriding rule of law limits what this court may deem to be "consideration", under this first equitable principle, the term must be construed broadly to mean something of value. Whether there was a thing of value and the measurement of that thing of value in dollars are matters of "substance". The precise form of the thing of value given by each claimant-stockholder and the manner in which it was paid are, clearly, matters of "form".

103. Stated otherwise, each claimant-stockholder seeks a determination by this court that he is owner of shares of substantial value. The "substance" of what he seeks, in the form of shares of stock of the debtor is the value that he claims he gave. If "substance" is not to give way to "form," each claimant who gave value should receive value in the form of shares of stock of the debtor.

104. Applying this test, the classification of claimants-stockholders proposed by the debtor must fail. To discharge antecedent indebtedness whether, by application of collateral held as security after extending some period of time [fol. 266] to the debtor (Malakoff) to otherwise discharge the indebtedness, or by accepting a present transfer of

property to discharge the indebtedness without extending to the debtor (Malakoff) a period of time to otherwise discharge the indebtedness, is to give something of value.

105. Davidson's basic classification, based upon time, similarly falls. To ground the rights of the claimants-stockholders on the fortuitous circumstances of whether they made their investments before or after the date when Malakoff arbitrarily chose to commence the issuance of certificates, is to throw aside considerations of "substance" and to render "form" controlling. Davidson's subordinate classification of his fourth class of claimants-stockholders, similar to the classification by the debtor of all claimants-stockholders is invalid for the reasons applicable to the Debtor's classification.

106. Applying the second stated principle of equity to the problem of classification, the principle that "technical considerations will not prevent substantial justice from being done," dictates the same determination reached by applying the first equitable principle. However abstract and indefinite the term "justice" may be, in the proceedings herein it is certainly just that all who paid Malakoff in the belief that they were investing in the debtor or the business of Nazareth, regardless of when they made such payments and in what form, should be treated the same. It would certainly seem unjust to differentiate between such persons on the basis of fortuitous chronology, or on the basis of the form as distinguished from the value of the consideration given for investments in Nazareth.

[fol. 267] 107. The term "technical considerations" is perhaps almost as vague and abstract as the word "justice", and the limits of its coverage almost as difficult to draw as are the definition and coverage of the word "justice". It, nevertheless, does seem correct to term the considerations urged by Davidson and the debtor in support of their respective classification schemes to be "technical".

108. The application of the third equitable principle stated above, the maxim,—"Equality if equity", requires no extended discussion. The directness of its application is almost mathematical. If equality is equity and if this

court is to do equity, the rights of all claimants must be granted equal protection. "Equal protection" in this context, can be assigned the same meaning assigned to it in its constitutional context, the absence of any scheme of classification not related to the purpose served by the rule of law under which the classification is made. See, *Cunningham* v. *U.S.*, 256 F.2d 467 (5th Cir. 1958).

109. The second problem subsumed by the basic question of who should be the stockholders and in what proportions, is that of choosing the basis for the determination of the numbers of shares to be awarded each claimant deemed to be a valid stockholder. The evidence narrows the choice to two bases:

(1) The basis of the amount, in money, or money's worth, of the investment;

(2) The basis of the number of shares promised by Malakoff.

[fol. 268] 110. Applying the first stated principle of equity, that substance should not give way to form, what is to be deemed substance and what is be deemed form? The answer is clear from the evidence summarized above. Malakoff sold investments in Nazareth, not shares of stock per se. He promised an annual return of 20% on the number of dollars invested. He paid "dividends" on that number of dollars invested by each claimant, not on the number of shares held by each claimant. In a number of cases the number of shares granted to investors were fortuitous. In several cases it was changed by renegotiation. Under these circumstances "substance" must be deemed to mean the number of dollars invested by each claimant, and "form" must be deemed to mean the number of shares set forth on the certificate or certificates held by each claimant.

111. Equally clear is the answer to the second question under the second stated principle of equity. It would be substantially unjust to determine the numbers of shares to be awarded to each claimant on the basis of the numbers on the face of the certificates issued, in the light of the proof that in many important respects Malakoff disre-

garded the corporate entity. There is no difficulty in assigning the adjective "technical" to the consideration of the number of shares set forth on each certificate issued by Malakoff.

112. Davidson argues that a Board of Directors has the power to fix the consideration charged and to be received for shares of stock, and that each investor should be given the benefit of his bargain. The defect in this argument is obvious. There never was a Board of Directors of the [fol. 269] debtor acting at any time during which Malakoff was promoting and managing Nazareth. Even if Malakoff alone be deemed to have constituted a Board of Directors, the criteria used by him, in the case of the investments in which the numbers of shares promised and issued represented deliberate choices and were not arbitrary or fortuitous, were hardly those which could pass a test of good faith.

113. As in its application to the first problem of classification, the application of the third stated principle of equity is self-evident and almost mathematical in its certitude and definiteness. Each net dollar invested in Nazareth by each claimant-stockholder should purchase an equal fraction of a share of its stock.

114. The problem of over-issuance, in connection with which both Davidson and the debtor depart from equity and return to technical rules of law, does pose a serious question as to whether an almost absolute rule of the law of corporations overrides considerations of equity. This is discussed at a later point in this Report. Reserving that question, there is utterly no problem as to the result dictated by the equitable principles stated above.

115. The number of shares authorized by the disregarded certificate of incorporation of an almost completely disregarded corporate entity is certainly "form" and not "substance". Any claim that it would be just to deny any interest in the stock of the debtor to those who made their investments and paid their consideration to Malakoff after he, deliberately or inadvertently, sold shares in excess of the authorized number, would have to be dismissed as sham

[fol. 270] and frivolous. No such claim is made by either the debtor or Davidson. The claim that overissued shares are absolutely void rests upon a purportedly absolute rule of law, not on any equitable principles.

116. In connection with the over issuance problem, the equality which is equity is clearly equality as between those who innocently and unknowingly invested or received their shares after the authorized 200 had been accounted for and those who did so before the authorized 200 had been accounted for. This maxim of equity requires that the over issuance be disregarded, in the absence of an absolutely controlling rule of law requiring a contrary conclusion.

117. Each of the three stated principles of equity has been applied to each of the three problems involved in the determination of the basic question before this court. If the stated equitable principles are to govern the determination of the debtor's objections to the 36 proofs of stock interest, only one answer can be given by this court to the basic question before it: each claimant-stockholder who gave value to Malakoff for an interest in Nazareth should be deemed to be a valid and bona fide stockholder of the debtor and should be deemed the owner of that proportion of 200 shares, which his net investment, as hereinbefore valued, bears to the total of all the net investments, as hereinbefore valued, by all claimants deemed to be valid stockholders. As stated, the dividends represent the return of capital and have been considered in computing the net investment of each stockholder.

[fol. 271] 118. In the opinion of the Examiner, not only is there no overriding rule of law compelling a determination different from that which follows from the application of the three stated principles of equity, but applicable rules of law themselves support and require the same determination. The applicable rules of law, and some which are inapplicable, are discussed below.

The Applicable and Inapplicable Rules of Law

119. It is conceded by all parties and must be found as a fact by this court that the debtor itself received nothing directly from the sale and issuance of all of the shares of

stock held by the claimants-stockholders. Nor did any of the claimants prove the indirect receipt by the debtor of the consideration paid to Malakoff. This want of consideration by the debtor itself for the issuance of its shares of stock can, at the most, render such shares voidable, and not absolutely void. *Bradford County Tel. Co.* v. *Young*, 329 Pa. 433, 198 Atl. 96 (1938); *Kathiotes* v. *Mosler*, 89 D. & C. 174 (Pa. 1955); *In re Dissolution of New Oxford Shoe Co.*, 45 D. & C. 53 (Pa. 1942); *Grafton* v. *Musteller*, 232 F.2d 773 (3d Cir. 1956) cert. den. 352 U.S. 832 (1956); cf. Pa. Const. Art. XVI, § 7, Pa. B.C.L. 603(A), 15 Pa. Stat. Ann. § 2852-603(A) (Purdon 1958).

120. The debtor does not now urge this lack of consideration by the debtor itself as a ground of objection to all claims of stock interest. It does seek to limit the allowance [fol. 272] of such claim to those who paid a present consideration to Malakoff, and to disallow the claims of stock interest by those who took shares of stock of the debtor in payment of antecedent indebtedness by Malakoff, or as security for the payment of such antecedent indebtedness.

121. The proper definition and concept of "consideration" does not support this position of the debtor. It is generally recognized that discharge of an antecedent debt is consideration. See, e.g. N.Y. Pers. Prop. Law § 183(1) (Uniform Stock Transfer Act § 22, 6 U.L.A.):

> "'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security thereof."

See also, 15 Pa. Stat. Ann. §§ 301-324 (repealed by Uniform Commercial Code in 1953); N.Y. Pers. Prop. Law § 156(1); U.C.C. §1-201; 1 Corbin, Contracts § 212, p. 701 (1950).

122. The transfer of stock as security for an antecedent debt constitutes consideration in Pennsylvania and in New York under the Uniform Stock Transfer Act. 6 U.L.A. § 22, N.Y. Pers. Prop. Law § 183(1) supra; 15 Pa. Stat. Ann. §§301-324 (repealed in 1953 by U.C.C.).

123. The tangled and confused history of the debtor and of the operations of Malakoff as its promoter and manager have rendered it impossible for this court to determine whether the shares of stock which he caused to be issued to the claimants-stockholders herein were newly issued shares or shares transferred from and by him. Whichever conclusion is the correct one, however, each claimant-[fol. 273] stockholder who paid money to Malakoff for an interest in Nazareth, or took an interest in satisfaction of an antecedent indebtedness by Malakoff to him, or took an interest in Nazareth to secure the payment of such an antecedent indebtedness remaining unpaid, gave "consideration" for shares of stock of the debtor. The distinction and classification urged by the debtor is contrary to the applicable substantive law as well as contrary to the broad equitable principles which the debtor itself urges upon this court.

124. Law as well as equity requires that the number of shares awarded to each claimant deemed to be a valid owner of shares be determined on the basis of the amount of his or her net investment, not on the basis of the number of his shares set forth on the certificates.

125. The certificates issued by Malakoff to the claimants-stockholders herein are not the shares of stock owned by them. They are mere muniments of title, and only *prima facie* or some evidence of the number of shares owned by the holders of such certificates.

Commissioner v. *Crompton*, 137 Pa. St. 138, 28 Atl. 417 (1893);
Keystone Wrapping Machinery Co. v. *Bromeier*, 42 Pa. Super. 384 (1909).

126. The conduct of Malakoff himself is of far greater weight in determining the number of shares owned by each claimant than are the numbers set forth on the face of the certificates issued to the claimants. The most significant factor in determining the proportionate interest which each claimant had in Nazareth is the amount of the "dividends" which Malakoff paid to each claimant. This was [fol. 274] his true valuation of the investment by each claimant and was accurately based upon the dollar amount of such investment.

127. It is true that a corporation may sell and issue stock at varying prices and for varying amounts and kinds of consideration, as Davidson argues. The policy of the law in this regard is simply to give to each purchaser of stock without par value, or at a price above par value, the benefit of an honest bargain, a policy no different from that applied to persons buying or selling automobiles or grapes. In the case of the debtor herein and Malakoff, however, this principle can only be applied if the court throws away the thousands of pages of testimony which it so patiently heard and received, and treats the debtor as a corporation, and Malakoff as a president of a corporation carrying on its business, in strict conformity to all of the rules of corporate organization, law and procedure. There was no Board of Directors fixing the nature or amount of consideration to be received for the stock which Malakoff issued. Malakoff was not even selling shares of stock as such. He was selling fractional interests in Nazareth, primarily by promising 20% annual return on the number of dollars invested by each buyer of an interest.

128. It is by examining closely the nature of the business enterprise which Malakoff created, and finding and applying the rules of law governing such a business enterprise, not by applying the textbook rules governing regularly constituted and operating corporations, that the correct legal relationship of the debtor and the claimants-stockholders can be determined.

[fol. 275] 129. Malakoff completely dominated and controlled the debtor. There were virtually no meetings of the directors of the debtor during the period of the control of it by Malakoff and no meetings of stockholders. Malakoff regarded the debtor corporation as a mere instrumentality of his own to conduct the business of Nazareth, the form of which he deemed himself able to change at will. For stock purposes he did not consider the debtor as a legal entity separate and apart from himself. He alone was the responsible agent causing the issuance of its stock. He alone received and used the moneys paid by various claimants, or cancelled his personal indebtedness by issuing shares to claimants, or transferred shares as security for

the payment of such antecedent indebtedness. The moneys which he received were commingled with other of his funds emanating from investors, real estate deals and other sources. Malakoff caused "dividends" to be paid to the claimants on their investments in the debtor, but no Board of Directors ever met to consider the declaration and payment of any such "dividends". Until shortly before the institution of the reorganization proceedings herein the payments were made with his checks drawn on his own personal accounts and not on any accounts of the debtor. "Dividends" were not paid from the profits of the debtor. The funds for the "dividends" were funds of Malakoff's, obtained at times through loans at usurious rates of interest and through check-kiting devices.

130. To the majority of investors in Nazareth, the claimants-stockholders herein, it was no more a separate corporate entity than to Malakoff. The investors, by and large, did not consider themselves to be purchasing shares [fol. 276] of corporate stock, but did consider themselves to be investing in Nazareth as a business enterprise or simply investing money in Malakoff, on his promise of a 20% annual return. All of the investors' money was paid to Malakoff alone. They knew and understood that the basis of payment of "dividends" to them was the money invested, not the number of shares received. The very receipt which most of them were given by Malakoff was one in which he asserted the unilateral power to at any time change the form of business association of himself and the investors to that of a limited partnership or some other form. Most of the investors were unsophisticated in the ways of business organization and financing and did not understand or regard as of any real importance whether they were receiving stock in a corporation or some other evidence of an interest in some form of business association with Malakoff.

131. It is unnecessary to find the correct legal term to describe the type of business enterprise which Malakoff created out of the Nazareth Market, if there is any term in legal literature which can correctly describe the unique form of enterprise which he created. It is both wrong and

unjust for this court to attempt to pick some orthodox term from the literature of law or finance to describe the unique creation of Malakoff which is the debtor, and then apply a body of law fashioned to govern ordinary enterprises of that type in ordinary situations. In one sense, Nazareth was a corporation *de jure*, because its Articles of Incor- [fol. 277] poration were duly received and a Certificate of Incorporation duly granted. In another case, it was merely a *de facto* corporation, because it never actually completed its organization by the regular issuance of stock, the regular election of directors and officers, and the regular conduct of meetings of stockholders and directors and other corporate activities. In still another sense, it was simply a joint venture, with Malakoff as the managing venturer.

132. Whatever the correct term is that should be applied to the debtor, this court is permitted and required, for purposes of determining who are the owners of the debtor and in what proportions:

(1) to disregard the corporate entity of the debtor;

(2) whether or not the corporate entity is disregarded, to treat Malakoff and the claimants-stockholders as joint venturers.

133. No detailed citation or discussion of the authorities in connection with the disregarding of a corporate entity, sometimes referred to as the piercing of a corporate veil, is needed. There is no doubt that Nazareth and Malakoff were *alter egos*.

Barkin Const. Co. v. *Goodman*, 221 N.Y. 156, 116 N.E. 770 (1917);

Chestnut St. Trust & Savings Fund Co. v. *Record Pub. Co.*, 227 Pa. 235, 75 Atl. 1067 (1910);

Allen v. *France Packing Co.*, 170 Pa. Super. 632, 90 A.2d 289 (1952);

[fol. 278] *Jackson* v. *M. H. Thomas Inv. Co.*, 46 F 2d 252 (5th Cir. 1951);

Mosher v. *Salt River Valley Water Users Assn.*, 39 Ariz. 567; 8 P.2d 1077 (1932).

134. Consideration of the facts in other cases in which corporate entities for one or more purposes have been disregarded is equally pointless. Suffice it to say that a case with more ample justification than the case of this debtor for disregarding a separate corporate entity, for whatever purpose or purposes necessary to prevent injustice, would be difficult to conceive or imagine. It is hardly possible to construct by hypothesis a corporation which would be more of a mere instrumentality of its dominant promoter, officer, stockholder and manager than the debtor herein was of Malakoff.

135. Under these circumstances, and with this court fully empowered and indeed required by every consideration of fairness, justice and equity to pierce what was hardly even a veil between Malakoff and the debtor corporation, the ordinary requisites of the validity of the issuance of stock become mere academic niceties. To talk of the performance of such ordinary requisites for the issuance of stock in the case of Nazareth is to construct a whole world of corporation law, practice, custom and ritual which never existed in the mind of Malakoff, or in that of most of the claimants-stockholders. It is upon understanding the true nature of Nazareth as a business enterprise, and not as a corporate entity which never existed in actuality, that the answers to the problems of allocation of shares and of the so-called over-issuance of shares, as well as that of "consideration" for shares, be-[fol. 279] come clear and compelling.

136. If the claimants-stockholders invested in Nazareth the business enterprise and not Nazareth, the corporate entity, there is no problem of consideration to the debtor itself. Consideration to Malakoff can be treated as consideration to the debtor, justifying the sustaining of the claims of stock interest interposed by the claimants-stockholders herein on the basis of such consideration. The certificates of stock received by the claimants, and their designations of numbers of shares, are not even muniments of title or *prima facie* evidence of the proportionate interests of their holders in Nazareth as an enterprise.

137. If the interests of the claimants-stockholders are deemed interests in Nazareth the business enterprise and not in Nazareth the corporation, nominally limited to 200 shares of stock, there is no problem of over-issuance. This court need only determine the proportionate interest in the whole business entity held by each of the claimants-stockholders, the basis of which determination should be the basis upon which Malakoff himself determined their proportionate interests, the consideration paid in money or money's worth by each investor. Whatever the nature of the capital structure and number of shares to be issued by the debtor herein, as provided for in any Plan of Reorganization hereafter approved and confirmed, such proportionate interests can and should be respected.

138. There is ample authority for determining the interests of the claimants-stockholders in Nazareth as joint venturers, whether or not the corporate entity of the [fol. 280] debtor be disregarded. The relationship between Malakoff and those who invested in Nazareth before the filing of the Articles of the debtor's Articles of Incorporation was that of joint venturers. The basis upon which Malakoff sold interests and upon which the claimants-stockholders purchased interests after the filing of its Articles, was also that of joint venture. The fact that the enterprise took the form of a corporation, whether the separate entity of the corporation be recognized or disregarded, did not destroy the joint venture.

DeBoy v. *Harris*, 207 Md. 212, 113 A.2d 903 (1955);
Denny v. *Guyton*, 327 Mo. 1030, 40 S.W.2d 562 (1931);
Beardsley v. *Beardsley*, 138 U.S. 262, 34 L.Ed. 928 (1891);
Sweet v. *Watson's Nursery*, D.C. of Appeals 4th Dist. Cal. (1939) 33 Cal.App.2d 699, 92 P.2d 812;
Watkins v. *Delahunty*, 133 App.Div. 422, 117 N.Y.S. 885 (1909);
Cf. *Jackson* v. *Hooper*, 76 N.J.Eq. 592, 75 A. 568 (1910);

Manacher v. *Central Coal Co.*, 284 App.Div. 380 (1954), 131 N.Y.S.2d 671.

139. Under the now majority rule, whenever parties to a joint venture agree to operate through the medium of a corporation, the joint venture agreement is not superseded by the organization of the corporation. This conclusion is based upon:

(1) Court's policy to give expression to the joint venture agreement; and

[fol. 281] (2) The belief that where third parties and creditors are not adversely affected, there are no policy considerations compelling abrogation of the agreement.

140. In the leading case of *DeRon* v. *Harris*, supra, the plaintiff and defendants Harris and Smith orally agreed to form a joint venture for the purpose of building commercial properties. The respective capital contributions were to be the measure of a fixed percentage ownership in the assets and profits of the venture and these interests were to be fixed by the issuance of stock in a corporation which was to be formed to act as an instrumentality of the venture. Some years after formation of the contemplated corporation, the defendants, over plaintiff's objection, increased the authorized shares of the corporation and caused the issuance of additional stock to defendant. Though the plaintiff was given the opportunity to participate in the issue he brought an action for damages claiming that the defendants' action was a direct violation of the joint venture agreement. The Maryland Court of Appeals overruled the defendants' demurrer and held that the plaintiff had stated a cause of action for an equitable accounting.

141. If the rights of stockholders of *de jure* corporations, regularly organized and operating and observing all of the rules and procedures of corporate law and procedure, can be determined by considering them members of a joint venture operating in the form of a corporation, this court may certainly do so with respect to the rights of the claimants-stockholders herein. If the relationship of Mala-[fol. 282] koff and the claimants-stockholders, for purposes

of determining who owns the debtor is deemed to be that of venturers, there is no requirement of the payment of consideration to the debtor itself. The payment of consideration to Malakoff, as the managing adventurer, establishes the interest of each investor in the venture. The proportion of the interest of each is determined by the amount of his investment in the venture, as evidenced by the accounts of the managing adventurer, Malakoff, to wit, the payment of "dividends". There is no problem of over-issuance because each investor is determined to have the fractional interest in the entire enterprise which the amount of his investment bears to the total of all investments. The proportions of the interests so determined become the proportions of the total number of shares of stock issued by the corporate entity through which the venture operates, which will be the debtor as reorganized, pursuant to any approved and confirmed Plan of Reorganization.

142. One additional and independent ground exists for disregarding any problem of over-issuance. It is true that an over-issuance of stock by a corporation or promoter has in some cases been held to be absolutely void. *Mount Holly Paper Co.* Appeal, 99 Pa. 514 (1882); *Wright's* Appeal, 99 Pa. 425 (1882); 12 A Pa. Stat. Ann. §8-104 (U.C.C.).

143. To hold any of the shares claimed by the claimants-stockholders herein void on account of over-issuance, however, this court must determine whose shares were and are the over-issued shares. The fact is that no rational or just basis appears in the record for any such determination. To [fol. 283] simply take the certificates of stock in the order that their numbers bear until the aggregate of the shares represented thereby is 200 and deem all beyond that over-issued and void, is obviously unjust. The order in which Malakoff made out certificates to the investors and the numbers assigned to the certificates, as well as the dates when he issued such certificates, were purely fortuitous or arbitrary. To take as a basis for determining the over-issued shares the order in which investors agreed to subscribe for shares, is likewise unjust. It is also impossible because the facts upon which such a determination must be based are not in the record. This is likewise true with

respect to using the order of payment of consideration for the shares.

144. To determine which shares are over-issued and thus void, this court would have to determine which shares are valid. As is admitted by all parties, and hereinbefore pointed out in this Report, none of the claimants-stockholders has a valid legal claim to any shares. It can, therefore, be fairly stated that no claimant has validly held any shares. It is this court alone which, by orders entered herein, will validate shares. In this sense, there has been no over-issuance because there were no 200 shares or any number of shares validly issued prior to the unknown and unknowable date or dates when the "over-issued" shares were subscribed for or issued. Furthermore, in a very real sense, the equitable maxim, "He who seeks equity must do equity" should be applied, since it is only their search and finding of equity through this court that those claimants, whoever they may be, who were issued the first 200 shares [fol. 284] have any valid shares at all.

145. This inability of the court to determine which of the shares are over-issued is itself sufficient reason for disregarding any problem of over-issuance. It can fairly be said that few if any courts have ever been more patient in extending every opportunity to seemingly inexhaustible and indefatigable litigants and their attorneys to prove their respective claims. The failure by both of the principal adverse parties, the debtor and Davidson, to furnish this court with any rational basis for determining whose shares are the over-issued shares is reason enough for this court's following the determination dictated by the equitable principles which all parties urge upon this court.

Conclusion

146. Both equitable principles and applicable rules of substantive law justify and require holding that each claimant-stockholder who invested in Nazareth by the payment of money to Malakoff, or accepted shares of the debtor's stock in payment of antecedent indebtedness of Malakoff or as security for such indebtedness of Malakoff, be

deemed the valid owner of shares of stock of the debtor, in the proportion which the fair value so paid by each claimant-stockholder bears to the aggregate amount of all such values paid, in each case subtracting dividends.

Annexed hereto as "Exhibit A" is a schedule setting forth the name of each claimant-stockholder, the certificate number or numbers of the certificate or certificates standing in said claimant's name, the total number of shares claimed [fol. 285] by each claimant, the dollar amount of consideration paid by each claimant, the net value of the investment of each claimant as determined above adjusted to the nearest multiple of $10, and the proportion of the total number of the 200 shares of the debtor's capital stock which the Examiner recommends be awarded to each claimant.

No recommendation is made by the Examiner at this time with respect to the counterclaims by the debtor against claimants-stockholders. The proportions of the stock of the debtor which the claimants-stockholders are deemed to own are subject to adjustment in the event that this court upholds, upon review, the claims of the Margolis group.

Respectfully submitted,

Charles Seligson, Examiner.

Dated: New York, New York, April 21, 1960.

[fol. 286]

Name of Claimant	Certificate No.(s)	Number of Shares Claimed	Consideration Paid	Total Dividend Received	Adjusted Net Value	Recommended Proportion of Stock
A. Bikales	16	5	$5,000.	$1,666.80	$3,330.	3330/173,450
M. Bluestone	24	2	2,000.	566.78	1,430.	1430/173,450
C. Bond	48	1	1,000.	33.34	970	970/173,450
B. Clark	12	4	4,000.	1,316.73	2,680	2680/173,450
D. Clark	11	3	3,000.	768.40	2230.	2230/173,450
F. Como	9 41	4 2	6,000	1,366.73	4,630.	4630/173,450
L. Como	7 42	4 2	6,000.	1,466.73	4,530	4530/173,450
P. Como	37 38	6 2	8,000.	326.66	7,670	7630/173,450
H. & M. Danciger	74	11	10,946.97	-o-	10,950	10,950/173,450
H. Forman	59 73	5 5	10,000.	-o-	10,000.	10,000/173,450

[fol. 287]

Name of Claimant	Certificate No.(s)	Number of Shares Claimed	Consideration Paid	Total Dividend Received	Adjusted Net Value	Recommended Proportion of Stock
S. Forman	49	15	13,000.	-0-	13,000	13,000/173,45
A. Fried	25	3	3,000	683.41	2,32	2320/173,450
J. Fried	15	3	2,000	633.-0	1,370	1370/173,450
C. Grossman	61	2	2,000	72.22	1,930.	1930/173,450
R. Hull	6	4				
	62	2	3,600.	1,200.00	2,400.	2400/173,450
D. Kane	19	3	3,000.	950.01	2,050.	2050/173,450
C. Kanter	71	8				
	72	20				
	4	12	20,800.	3,800.	17,000.	17,000/173,45
R. Kaplan	40	1	1,000.	16.67	980.	980/173,450
L. Karapontso	39	2	2,000.	188.92	1,810	1810/173,450
F. Katzenell	51, 52, 53, 54, 55, 56	35	16,850.	7,250.	9,600	9600/173,450
	57					

[fol. 288]

Name of Claimant	Certificate No.(s)	Number of Shares Claimed	Consideration Paid	Total Dividend Received	Adjusted Net Value	Recommended Proportion of Stock
G. Klein	6	14	14,000.	2,534.22	11,470	11,470 / 173,450
M. Klein	22	4	3,350	566.68	2,780.	2780 / 173,450
H.L. Laupheimer	23	8	7,750	1,794.45	5,960	5960 / 173,450
E. Manoochehrian	36	14	11395.75	177.75		
	63	6	11,428.58	211.11	11,220.	11,220 / 173,450
H. Masur	13	4	4,000.	1,333.40	2,670.	2670 / 173,450
R. Noire	58	5	5,000	-0-	5,000.	5000 / 173,450
E. Pollak	31	9	9,000	600.00	8,400.	8400 / 173,450
A. Rosen	27	6	6,000	1,569.43	4,430.	4430 / 173,450
M. Samet	5	2	2,000	700.14	1,300.	1300 / 173,450
L. Saul	20	3	3,000	950.00	2,050.	2050 / 173,450
G. Schwartz	30	2	2,000.	83.35	1,920.	1920 / 173,450

[fol. 289]

Name of Claimant	Certificate No.(s)	Number of Shares Claimed	Consideration Paid	Total Dividend Received	Adjusted Net Value	Recommended Proportion of Stock
H. Schwartz	29	4	4,000.	308.37	3,690.	3690/173,450
T. Schwartz	60	3	3,000	-0-	3,000.	3000/173,450
R. Spielholz	21	3	3,000	426.67	2,570.	2570/173,450
L. Treat	17	2	2,000	666.80	1,330.	1330/173,450
A. Weinstein	18	7	7,000	2,216.54	4,780.	4780/173,450

SEE EXPLANATORY NOTE

[fol. 290] NOTE

The figure of 173,450, the denominator in each fraction in the column "Recommended Proportion of Stock" represents the sum of the figures in the column "Consideration Paid" minus the sum of the figures in the column "Total Dividend Received." The numerator in each fraction in the column "Recommended Proportion of Stock" represents the amount of "Net Consideration Paid" applicable to each claimant rounded off to the nearest multiple of $10. The denominator in the fractions in the column "Recommended Proportion of Stock" has been rounded off to the nearest multiple of $10.

[fol. 293]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 89669

[Title omitted]

PETITION FOR REMOVAL OF PRESIDENT, SECRETARY-TREASURER AND GENERAL MANAGER OF DEBTOR FOR MISCONDUCT IN OFFICE AND FOR TERMINATION AND RECOUPMENT OF COMPENSATION—Filed June 23, 1960

To the Honorable Sidney Sugerman, Judge of the United States District Court for the Southern District of New York:

The Petition of Irving J. Wolf, respectfully represents:

1. On September 28, 1953, Nazareth Fair Grounds & Farmers' Market, Inc. (hereinafter called "Nazareth" and the "Debtor"), filed a petition herein, verified September 25, 1953, which petition prayed that proceedings be had under Chapter X of the Bankruptcy Act; and by orders dated September 28, 1953, this Court approved said petition and continued the Debtor in possession; and said Debtor continues in possession at present.

2. Petitioner is the nominal owner and holder of forty (40) shares of stock in Nazareth registered in the name of Charles Kanter, and assigned to Petitioner on December 5, 1957; the beneficial interest is in his principals, Wilson D. Rehrig and Frederick Katzenell, for whom Petitioner is agent and attorney-in-fact, pursuant to Agreements dated December 5, 1957, heretofore filed herein.

[fol. 294] 3. Since June 29, 1953, Arnold A. Weinstein (hereinafter called "Weinstein") has been President and a director of the Debtor; and H. Lawrence Laupheimer (hereinafter called "Laupheimer") has been Secretary-Treasurer and a director of the Debtor; and Jerome Fried (hereinafter called "Fried") has been General Manager of the Debtor. By orders of this Court dated September 28, 1953, Weinstein, Laupheimer and Fried were authorized to continue serving in the aforesaid offices. By orders of this Court dated September 28, 1953, April 28, 1955, May 19, 1955, June 14, 1955, and January 13, 1956, the Debtor was authorized to pay certain compensation to Weinstein and Fried for services rendered by them to the Debtor, and to reimburse them for certain expenditures made by them; and Weinstein and Fried have regularly received such compensation and reimbursement pursuant to the aforesaid orders. Nazareth Enterprises, Inc. is a Pennsylvania corporation, the stock of which is owned in equal shares by Fried and his wife, and the president of which is Fried.

4. Petitioner complains of Weinstein as President and a director of the Debtor, and of Laupheimer as Secretary-Treasurer and a director of the Debtor, and of Fried as General Manager of the Debtor, and specifies the following causes and grounds for their removal from their respective offices and for the termination and recoupment of compensation and reimbursement by the Debtor:

A. Trading in Stock of Debtor

5. On or about May 7, 1957, Weinstein purchased two-thirds (⅔) of one (1) share of stock in Nazareth from Laupheimer.

[fol. 295] 6. On or about May 7, 1957, Laupheimer purchased one (1) share of stock in Nazareth from Dorothy Holober Clark, and sold two-thirds (⅔) of said share to Weinstein.

7. On or about December 24, 1957, Jerome Fried purchased the interest of Eskander Manoochehrian in his twenty (20) shares of stock in Nazareth; and on or about September 11, 1958, Jerome Fried sold ten (10) of the aforesaid twenty (20) shares to Eskander Manoochehrian, leaving Jerome Fried with a beneficial interest in ten (10) of the aforesaid twenty (20) shares.

8. On or about December 1, 1957, fourteen (14) persons who are stockholders of record of Nazareth, and who have filed proofs of interest herein claiming ownership of stock in Nazareth, signed (personally or by representatives) a certain "Agreement of the Stockholders", whereby each signatory granted to the other signatories an option or "right of first refusal" to purchase their respective shares of stock in Nazareth. Weinstein, Laupheimer and Fried were each signatories of said Agreement, and solicited the signatures and acceptances of the other signatories. Other signatories included Barry Clark, Dorothy Holober Clark, and Lazar Karapontso.

9. On or about May 7, 1957, Weinstein's sister, Mrs. Blanche Waldman, purchased the aggregate interests of Harold Q. Masur and Lawrence Treat in their six (6) shares of stock in Nazareth. Weinstein acted as his sister's agent in said acquisitions.

10. On or about March 3, 1959, Fried exercised his option under the aforesaid Agreement of Stockholders dated December 1, 1957, whereby he offered and demanded [fol. 296] to purchase the interest of Barry Clark in his four (4) shares of stock in Nazareth, the interest of Lazar Karapontso in his two (2) shares of stock in Nazareth, and the interest of Dorothy Holober Clark in her remaining two (2) shares of stock in Nazareth. On or about April 10, 1959, Fried purchased the aforesaid shares of Barry Clark and Lazar Karapontso. Weinstein acted as Fried's agent in said acquisitions.

B. Diversion or Embezzlement of Property of Debtor

11. On August 18, 1952, Nazareth as Lessor and Joseph Sherman (hereinafter called "Sherman") as Lessee entered into a purported lease providing for Sherman's conducting a stock-car racing enterprise on the Debtor's property. Said lease was executed for the Debtor by Fried as General Manager. At the time of said execution and until April 28, 1953, Fried was a partner of Sherman's in the racing enterprise. On April 28, 1953, Sherman assigned his interest in said lease as tenant to Nazareth Enterprises, Inc.; and since then Nazareth Enterprises, Inc. has conducted the racing enterprise. Paragraph 3 of the aforesaid lease dated August 18, 1952, provides as follows:

> "3. In consideration whereof Lessee agrees to pay to Lessor the sum of Twelve (12%) percent of the gross admissions in the features set forth in Paragraph 1. However, on those days that the Lessee operates the food concessions for the events set forth in Paragraph 1, he shall pay the Lessor Fifteen (15%) percent of the gross admissions."

12. Commencing in 1954, Nazareth Enterprises, Inc. as Lessee, has paid the Debtor, as Lessor, only ten (10%) percent of the gross admissions on some or all of the days when Nazareth Enterprises, Inc. has operated the racing enterprise on the Debtor's property.

[fol. 297] 13. Payment to the Debtor by Nazareth Enterprises, Inc. of less than the full rentals required by the aforesaid lease dated August 18, 1952, was made with the knowledge and consent of Weinstein, Laupheimer and Fried, and without disclosure thereof to this court until April 20, 1959, and without approval thereof by this Court.

14. J & J Foods, Inc. (hereinafter called "J & J") is a Pennsylvania corporation, at least one-half (½) the stock of which is owned by James LaGrotte or his wife or both, and the officers and directors of which include James LaGrotte and his wife (hereinafter called collectively "LaGrotte"). Since prior to September 28, 1953, and

until the present, J & J or LaGrotte has been a lessee of the Debtor as lessor, and has operated a bake shop and certain prepared-food dispensaries on the Debtor's premises pursuant to certain leases providing for graduated percentage rentals of between ten (10%) percent and fifteen (15%) percent of the gross receipts of J & J or LaGrotte. The operations of J & J or LaGrotte include the sale of prepared food on the Debtor's property at the times when Sherman and Nazareth Enterprises, Inc. have conducted the racing enterprise.

15. Prior to 1954, and subsequent to September 28, 1953, J & J or LaGrotte paid Fried or Nazareth Enterprises, Inc. the percentage rentals provided for in their leases and based on gross receipts from the sale of prepared food on the Debtor's property at the times when Sherman and Nazareth Enterprises, Inc. conducted the racing enterprise; and Fried or Nazareth Enterprises, Inc. received such payment from J & J or LaGrotte, and purportedly accounted [fol. 298] to the Debtor for such rentals received, and said rentals were remitted to the Debtor or deposited to the Debtor's bank account.

16. Commencing in 1954, Fried or Nazareth Enterprises, Inc. has received from J & J or LaGrotte payment of percentage rentals of between ten (10%) percent and fifteen (15%) percent of the gross receipts of J & J or LaGrotte from the sale of prepared food on the Debtor's property at the times when Nazareth Enterprises, Inc. has conducted the racing enterprise. Fried has not properly accounted to the Debtor for such rentals received, and said rentals have not been wholly remitted to the Debtor or deposited to the Debtor's bank account; but instead said rentals have been retained in whole or in part by Nazareth Enterprises, Inc. or Fried or both.

17. Retention by Nazareth Enterprises, Inc. or Fried of some or all of the percentage rentals paid by J & J or LaGrotte and based on the gross receipts of J & J or LaGrotte from the sale of prepared food on the Debtor's property at the times when Nazareth Enterprises, Inc. has conducted the racing enterprise, has been accomplished

with the knowledge and consent of Weinstein, Laupheimer and Fried, and without disclosure thereof to this Court until April 20, 1959, and without approval thereof by this Court.

18. By reason of the foregoing, and directly or indirectly, this estate has been depleted; and Fried has knowingly and fraudulently appropriated to his own use, embezzled, spent, or transferred property belonging to this estate which came into his charge as trustee, receiver, custodian, or other officer of this Court; and Weinstein and Laupheimer have aided and abetted Fried in the premises.

[fol. 299]

C. Other Unauthorized Transactions

19. In 1957, Robert F. Sell (hereinafter called "Sell") was engaged or employed by the Debtor to pave the Debtor's parking lot; and the Debtor contracted with Sell, and incurred a liability to him, to pay therefor the principal sum of $15,329.25, plus interest thereon. Subsequently, interest was disallowed or waived, and this Court authorized the Debtor to pay the principal balance then owing to Sell, by order made on or about March 23, 1959.

20. On or about July 15, 1957, the Debtor entered into a contract with Melville A. Carty (hereinafter called "Carty"), whereby the Debtor borrowed from Carty the sum of $30,000, and agreed to repay Carty the principal in installments, with interest thereon in excess of six (6%) percent annually; and the Debtor assigned certain of its leases and future rents to Carty as security for and payment of said loan. Subsequently, interest was disallowed or waived, and this Court has authorized the Debtor to pay the principal balance now owing to Sell, by oral order made December 21, 1959, and not yet formally entered.

21. In 1957, the Debtor constructed an annex or addition to its new building, for use as an office, at a cost to the Debtor exceeding the sum of $6,000. Subsequently, said construction was approved, by order of this court made on or about May 19, 1958.

22. Notice of each of the aforesaid transactions described in Paragraphs 19, 20 and 21 was first given to this Court by persons other than Weinstein, Laupheimer and Fried, and subsequent to the occurrence of each respective transaction.

[fol. 300] 23. Each of the aforesaid transactions described in Paragraphs 19, 20 and 21 was entered into and engaged in, by Weinstein, Fried and Laupheimer, or with their knowledge and consent, but without prior disclosure thereof to this Court of prior approval thereof by this Court; and in the absence of such prior disclosure and approval, each of said transactions was initially unauthorized and void, and constituted misconduct by Weinstein, Laupheimer and Fried.

D. Improper Solicitation of Acceptances of Plan

* * * * * * *

[fol. 301] 29. Petitioner and his principals and attorney, have complied with all applicable laws regulating their activities and personnel.

30. Arnold A. Weinstein has appeared herein for himself; H. Lawrence Laupheimer has filed a proof of interest which does not reveal the name of any attorney, and has appeared herein lately for himself; Jerome Fried has appeared herein by Meyer Kraushaar, and lately for himself; Nazareth Enterprises, Inc. has not appeared generally herein; the Debtor has appeared herein by Alex L. Rosen; the Court has appointed Charles Seligson as Examiner herein, and the Court has directed that said Examiner receive notice generally herein or with respect to the subject matter of this Petition; and no other person has been designated to receive notice generally or with respect to this matter.

31. On or about March 16, 1959, Petitioner submitted to this Court his Petition, verified March 13, 1959, seeking [fol. 302] Termination and Recoupment of Compensation (Pursuant to Section 249 of the Bankruptcy Act) and

naming Weinstein, Laupheimer, Fried and Nazareth Enterprises, Inc. as respondents; said Petition first came on for hearing before this Court on March 23, 1959, and is now pending. Except for said Petition, no previous application has been made for the relief prayed for herein.

Wherefore, Petitioner prays:

(A) That Arnold A. Weinstein, H. Lawrence Laupheimer, and Jerome Fried be removed from their respective offices as President, Secretary-Treasurer, General Manager, and Directors of the Debtor (as the case may be);

(B) That hereafter in this proceeding, no compensation or reimbursement of expenses be allowed or paid to Arnold A. Weinstein, Jerome Fried, and Nazareth Enterprises, Inc. or any of them;

(C) That Arnold A. Weinstein, Jerome Fried, Nazareth Enterprises, Inc., and each of them, account to this Court for all compensation and reimbursement of expenses received by them heretofore from the Debtor for the period from and after September 28, 1953, and that Arnold A. Weinstein, Jerome Fried, Nazareth Enterprises, Inc., and each of them, restore to the Debtor, and that the Debtor recoup from each of them, all such compensation and reimbursement; and

(D) That Petitioner have such other and further relief as is just.

Dated: New York, New York, January 5, 1960.

Irving J. Wolf, as Assignee of Charles Kanter and as Attorney-in-Fact and Agent of Wilson D. Rehrig and Frederick Katzenell, Petitioner.

Melvin Lloyd Robbins, Attorney for Petitioner, Office & P.O. Address, 9 East 40th Street.

[fol. 303] *Duly sworn to by Irving J. Wolf, jurat omitted in printing.*

[fol. 304] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Reorganization No. 89669

In the Matter

of

NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., Debtor.

NOTICE OF SETTLEMENT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW INCIDENT TO ORDER AND JUDGMENT MADE JUNE 14, 1960, ON ELECTION PETITION—Filed August 1, 1960

Please Take Notice that the within proposed Amended Order and Judgment and Supplemented Findings of Fact and Conclusions of Law will be presented for settlement and signature herein to the Hon. Sidney Sugarman, one of the Judges of the within-named Court, at the office of the Clerk of this Court, Room 601, United States Courthouse, Foley Square, New York, New York, on the 1st day of August, 1960.

Dated: New York, New York, July 22, 1960.

Melvin Lloyd Robbins, Attorney for Petitioner, Irving J. Wolf, Office & P.O. Address: 9 East 40th Street, New York 16, N. Y.

To:

Arnold A. Weinstein, Esq., pro se, 225 Broadway, New York 7, N. Y.

Jerome Fried, pro se, 156 Pennsylvania Avenue, Easton, Pa.

H. Lawrence Laupheimer, pro se, 20 Fara Drive, Stamford, Conn.

Charles Seligson, Examiner, 350 Fifth Avenue, New York 1, N. Y.

Alex L. Rosen, Attorney for Debtor, 225 Broadway, New York 7, N. Y.

[fol. 305]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Reorganization No. 89669

In the Matter

of

NAZARETH FAIR GROUNDS & FARMERS' MARKET, INC., Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW INCIDENT TO ORDER AND JUDGMENT MADE JUNE 14, 1960, ON ELECTION PETITION—August 1, 1960

At New York, New York, in said District, on the 1st day of August, 1960.

The Following Petition having duly come on before this Court by notice of motion, namely: Petition, verified August 6, 1958, for Approval of Proposed Directors and Officers of Debtor (pursuant to § 191 of the Bankruptcy Act); and the Examiner and counsel for the respective parties having been heard thereon;

Now, upon the aforesaid Petition and related pleadings, affidavits, exhibits, and memoranda of law, and upon all the proceedings heretofore had before me; and upon this Court's opinions and decisions rendered on June 14, 1960 and July 14, 1960, and the Findings of Fact and Conclusions of Law therein contained; and good and sufficient reason and cause appearing to me therefor;

The Court hereby makes the Findings of Fact and states the Conclusions of Law annexed hereto.

Sidney Sugarman, U.S.D.J.

[fol. 306]

Findings of Fact

1. On September 28, 1953, Nazareth Fair Grounds & Farmers' Market, Inc. (hereinafter called "Nazareth" and the "Debtor"), filed a Petition herein, verified September 25, 1953, by Arnold A. Weinstein as President, which Petition prayed that proceedings be had under Chapter X of the Bankruptcy Act, and further prayed for other incidental relief (Wolf's 1).

2. On September 28, 1953, this Court, by Alexander Holtzoff, U.S.D.J. (sitting by designation) signed an order incident to the aforesaid Petition (Wolf's 1), namely: Order Authorizing Debtor in Possession to Operate Business, etc. (Wolf's 4).

• • • • • • •

[fol. 308] 3. Since June 29, 1953, one formal meeting of the Nazareth stockholders was held for the purpose of electing directors of Nazareth. On August 4, 1958, a formal meeting of the Nazareth stockholders of record was held at the registered office of the Debtor in Philadelphia for the purpose of electing directors of Nazareth. Said meeting was called by Wolf and several others (as stockholders of record and their assignees), at the instance and in behalf of Wolf's principals. At said meeting, Arnold A. Weinstein and Herbert Danciger and Martin H. Philip received all votes cast as directors of Nazareth; and said directors thereupon cast all votes for Weinstein as President, Laupheimer as Vice President, Danciger as Secretary and Philip as Treasurer.

[fol. 310]

Conclusions of Law

1. The Petition, verified August 6, 1958, for Approval of Proposed Directors and Officers of Debtor (pursuant to § 191 of the Bankruptcy Act), is granted; and the election and installation of the following officers and directors is approved, namely:

(a) Weinstein, as president and a director of the Debtor;

(b) Herbert Danciger, as secretary and a director of the Debtor;

(c) Philip, as treasurer and a director of the debtor; and

(d) Laupheimer, as vice president of the Debtor.

[fol. 312] Affidavit of Service by Mail (omitted in printing).

[fol. 313]

ROSEN & ROSEN
ATTORNEYS AT LAW
225 BROADWAY
NEW YORK 7, N. Y.

ALEX L. ROSEN
MARVIN N. ROSEN

BARCLAY 7-1788
1789

July 29, 1960

Hon. Sidney Sugarman
U. S. District Judge
Southern District of New York
Foley Square
New York 7, N. Y.

Re: *Nazareth Fairgrounds & Farmers Market, Inc.*

Dear Honorable Sir:

I have received through the mails various notices, proposed findings, memoranda, etc. from Mr. Robbins on the Nazareth matter which involve Mr. Weinstein.

Mr. Robbins knew that Mr. Weinstein was going and is away on vacation and is not expected back until August 8th or 9th.

As these matters primarily involve Mr. Weinstein and in his absence may I respectfully request that Mr. Weinstein be given the opportunity to reply, be heard or submit such papers as he deems proper in the premises. No damage or prejudice could occur to anyone by giving this oppor-

tunity to Mr. Weinstein to be heard or to submit such papers as he desires.

Thanking you,

Very truly yours,

/s/ ALEX L. ROSEN
ALEX L. ROSEN

ALR:C

cc: Melvin Robbins, Esq.
Charles Seligson, Esq.

[fol. 314] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
October 19, 1960

SIDNEY SUGARMAN, U.S.D.J.

[fol. 315] SUGARMAN, D.J.

Pursuant to an order entered herein on or about January 5, 1955, directing the filing of proofs of stock interests in the debtor, as well as proofs of claims by creditors, and 41 proofs of stock interests having been filed thereunder, aggregating 316 shares of the capital stock of the debtor, and 5 of said stock interests aggregating 54 such shares claimed by Benjamin Margolis, Ida Mae Margolis, Sarah Kason, Bernard Ungar and William McK. Schongut, having been referred to a referee in bankruptcy for trial and his recommendation thereon now pending review by this court, findings and conclusions are made as to the remaining 36 proofs of stock interests, aggregating 262 shares of the capital stock of the debtor.

Findings of Fact

1. On October 11, 1945 James A. Harter purchased the business and realty which later became that of the debtor, simultaneously executing a mortgage thereon to Rachel A. Metzger and Mildred E. Erickson for $8,500.

2. On January 11, 1949 Harter conveyed the realty and business to Nazareth Fairgrounds, Inc., a Pennsylvania [fol. 316] corporation, all of whose stock was owned by Harter and Laurena C. Shope. On that day Nazareth Fairgrounds, Inc. mortgaged the realty to Alice Kline for $14,500.

3. On March 13, 1951 Nazareth Fairgrounds, Inc. contracted to sell the business and realty of the seller to Richard Realty Co. for $66,000. This contract was entered into with the understanding that John Malakoff would acquire a one-quarter interest in the venture although actual title subsequently went to entities in which John Malakoff held no interest of record. John Malakoff acquired this one-quarter interest using in part funds supplied by Charles Kanter (Finding of Fact #18 *infra*), Gertrude Silver Klein (Finding of Fact #20 *infra*) and Morton Samet (Finding of Fact #19 *infra*).

4. On April 17, 1951 Nazareth Fairgrounds, Inc. conveyed its business and realty to Richard Realty Co., subject to the Metzger-Erickson mortgage of $8,500, the Kline mortgage of $14,500 and a purchase money third mortgage to Harter and Shope (stockholders of Nazareth Fairgrounds, Inc., the seller) for $10,000.

[fol. 317] 5. On April 20, 1951 the Kline mortgage was satisfied.

6. On May 14, 1951 Richard Realty Co. sold the business and realty aforesaid to Kipling Realty Co., subject to the remaining Metzger-Erickson and Harter-Shope mortgages. Both Richard Realty Co. and Kipling Realty Co. were Pennsylvania corporations, all of the stock of which was registered in the name of Murray Realty Co., a Pennsylvania partnership made up of Edward Malakoff and Maurice Malakoff as general partners. The corporations

were used solely as dummy corporations for the purpose of taking title to property in various real estate transactions. John Malakoff had no stock interest in either of them.

7. In July of 1951 John Malakoff orally agreed to purchase the business and real estate for the $66,000 paid by Richard Realty Co. and Kipling Realty Co., plus an unresolved amount, and approximately a week thereafter John Malakoff was put in possession of said business and realty and put his own manager in charge.

8. The debtor was incorporated under the laws of the State of Pennsylvania on or about the 7th day of August, 1951, with an authorized capitalization of 200 shares of no par value common stock.

[fol. 318] 9. On August 8, 1951 debtor's stock certificate number 1 for 10 shares was issued to Milton R. Zoloth and debtor's stock certificate number 2 for 10 shares was issued to Morris Soble, both of whom were associated in various transactions of Maurice Malakoff, one of the general partners of Murray Realty Co.

10. On September 26, 1951 Kipling Realty Co. formally transferred the business and realty aforesaid to the debtor, subject to then existing mortgages aggregating $18,000.

11. On October 17, 1951 Zoloth and Soble sold their 20 shares of the debtor's stock to John Malakoff.

12. In addition to John Malakoff's interest in and control of the venture prior to October 17, 1951, from that date and throughout the entire period of all of the transactions involved in the issuance of stock to the stock claimants herein, the debtor was dominated and controlled by him.

13. Every claimant acquired his or her shares of the debtor's stock by means of transactions with or through said John Malakoff or his agents.

[fol. 319] 14. John Malakoff commingled funds received by him from others for investment in the debtor with his own funds and with those of other corporations controlled by him.

15. Although only 200 shares of capital stock were authorized to be issued by the debtor, John Malakoff issued 316 such shares.

16. At no time between August 7, 1951 and September 28, 1953, both dates inclusive, were any dividends to the legal or beneficial holders of the debtor's common stock declared or authorized by the debtor or paid to such stockholders by the debtor with its own funds.

17. The so-called dividends received between August 7, 1951 and September 28, 1953, both dates inclusive, by the persons who acquired legal or beneficial interests in the debtor represented the return to them by John Malakoff individually, directly or indirectly, of moneys advanced by such persons, directly or indirectly, for or against their respective interests in the debtor.

[fol. 320] 18. As to the stock claim of Charles Kanter (certificates numbered 4, 71 and 72 for 40 shares):

a. Between April 10, 1951 and April 17, 1953 Charles Kanter transferred cash and valuable equities totalling $20,800 for an interest in the debtor.

b. Between September 1, 1951 and March 1953 Charles Kanter received back $3,800 in cash.

c. The net fair value of the investment in the debtor by stock claimant Charles Kanter is $17,000.

19. As to the stock claim of Morton Samet (certificate number 5 for 2 shares):

a. Between March 14, 1951 and April 10, 1951 Morton Samet transferred cash totalling $2,000 for an interest in the debtor.

b. Between September 1, 1951 and May 1, 1953 Morton Samet received back $700.14 in cash.

c. The net fair value of the investment in the debtor by stock claimant Morton Samet is $1,299.86.

20. As to the stock claim of Gertrude Silver Klein (certificate number 6 for 14 shares):

a. Between April 2, 1951 and November 15, 1952 Gertrude Silver Klein transferred cash and valuable equities totalling $14,000 for an interest in the debtor.

[fol. 321] b. Between September 1, 1951 and April 1, 1953 Gertrude Silver Klein received back $2,534.22 in cash.

c. The net fair value of the investment in the debtor by stock claimant Gertrude Silver Klein is $11,465.78.

21. As to the stock claim of Dorothy Holober Clark (certificate number 11 for 3 shares):

a. Between June 1, 1951 and the month of August 1952, Dorothy Holober Clark transferred cash totalling $3,000 for an interest in the debtor.

b. Between November 2, 1951 and May 1, 1953 Dorothy Holober Clark received back $768.40 in cash.

c. The net fair value of the investment in the debtor by stock claimant Dorothy Holober Clark is $2,231.60.

22. As to the stock claim of Barry Clark (certificate number 12 for 4 shares):

a. On August 1, 1951 Barry Clark transferred cash totalling $4,000 for an interest in the debtor.

[fol. 322] b. Between September 1, 1951 and April 1, 1953 Barry Clark received back $1,316.73 in cash.

c. The net fair value of the investment in the debtor by stock claimant Barry Clark is $2,683.27.

23. As to the stock claim of Harold Q. Masur (certificate number 13 for 4 shares):

a. Between August 1, 1951 and September 30, 1951 Harold Q. Masur transferred cash totalling $4,000 for an interest in the debtor.

b. Between October 1, 1951 and May 1953 Harold Q. Masur received back $1,333.40 in cash.

c. The net fair value of the investment in the debtor by stock claimant Harold Q. Masur is $2,666.60.

24. As to the stock claim of Louis Como (certificates numbered 7 and 42 for 6 shares):

a. Between August 1951 and March 1953 Louis Como transferred cash totalling $6,000 for an interest in the debtor.

b. Between September 1, 1951 and May 1, 1953 Louis Como received back $1,466.73 in cash.

[fol. 323] c. The net fair value of the investment in the debtor by stock claimant Louis Como is $4,533.27.

25. As to the stock claim of Frank Como (certificates numbered 9 and 41 for 6 shares):

a. Between August 1951 and January 1953 Frank Como transferred cash totalling $6,000 for an interest in the debtor.

b. Between September 1, 1951 and April 1, 1953 Frank Como received back $1,366.73 in cash.

c. The net fair value of the investment in the debtor by stock claimant Frank Como is $4,633.27.

26. As to the stock claim of Patsy Como (certificates numbered 37 and 38 for 8 shares):

a. Between January 1953 and March 1953 Patsy Como transferred cash totalling $8,000 for an interest in the debtor.

b. Between March 2, 1953 and May 1953 Patsy Como received back $326.66 in cash.

c. The net fair value of the investment in the debtor by stock claimant Patsy Como is $7,673.34.

27. As to the stock claim of Anne Bikales (certificate number 16 for 5 shares):

[fol. 324] a. On August 30, 1951 Anne Bikales transferred cash totalling $5,000 for an interest in the debtor.

b. Between October 1, 1951 and May 1, 1953 Anne Bikales received back $1,666.80 in cash.

c. The net fair value of the investment in the debtor by stock claimant Anne Bikales is $3,333.20.

28. As to the stock claim of Lawrence Treat (certificate number 17 for 2 shares):

a. On September 11, 1951 Lawrence Treat transferred cash totalling $2,000 for an interest in the debtor.

b. Between November 1951 and May 1953 Lawrence Treat received back $666.80 in cash.

c. The net fair value of the investment in the debtor by stock claimant Lawrence Treat is $1,333.20.

29. As to the stock claim of Dorothy Kane (certificate number 19 for 3 shares):

a. Between September 18, 1951 and November 2, 1951 Dorothy Kane transferred cash totalling $3,000 for an interest in the debtor.

[fol. 325] b. Between October 1, 1951 and May 1953 Dorothy Kane received back $950.01 in cash.

c. The net fair value of the investment in the debtor by stock claimant Dorothy Kane is $2,049.99.

30. As to the stock claim of Miriam Klein (certificate number 22 for 4 shares):

a. Between September 17, 1951 and February 1, 1953 Miriam Klein transferred cash and valuable equities totalling $3,350 for an interest in the debtor.

b. Between November 1, 1951 and April 30, 1953 Miriam Klein received back $566.68 in cash.

c. The net fair value of the investment in the debtor by stock claimant Miriam Klein is $2,783.32.

31. As to the stock claim of Ruth Spielholz (certificate number 21 for 3 shares):

a. Between September 19, 1951 and January 26, 1953 Ruth Spielholz transferred cash totalling $3,000 for an interest in the debtor.

b. Between October 1, 1951 and April 1, 1953 Ruth Spielholz received back $426.67 in cash.

[fol. 326] c. The net fair value of the investment in the debtor by stock claimant Ruth Spielholz is $2,573.33.

32. As to the stock claim of Mae Bluestone (certificate number 24 for 2 shares):

a. On October 31, 1951 Mae Bluestone transferred cash totalling $2,000 for an interest in the debtor.

b. Between December 1, 1951 and April 1, 1953 Mae Bluestone received back $566.78 in cash.

c. The net fair value of the investment in the debtor by stock claimant Mae Bluestone is $1,433.22.

33. As to the stock claim of Gussie Schwartz (certificate number 30 for 2 shares):

a. On January 14, 1953 Gussie Schwartz transferred cash totalling $2,000 for an interest in the debtor.

b. Between February 2, 1953 and April 1, 1953 Gussie Schwartz received back $83.35 in cash.

c. The net fair value of the investment in the debtor by stock claimant Gussie Schwartz is $1,916.65.

[fol. 327] 34. As to the stock claim of Harold B. Schwartz (certificate number 29 for 4 shares):

a. Between July 23, 1952 and January 14, 1953 Harold B. Schwartz transferred cash totalling $4,000 for an interest in the debtor.

b. Between August 1, 1952 and April 1, 1953 Harold B. Schwartz received back $308.37 in cash.

c. The net fair value of the investment in the debtor by stock claimant Harold B. Schwartz is $3,691.63.

35. As to the stock claim of Lazar Karapantso (certificate number 39 for 2 shares):

a. In December 1952 Lazar Karapantso transferred cash totalling $2,000 for an interest in the debtor.

b. Between January 1953 and May 1953 Lazar Karapantso received back $188.92 in cash.

c. The net fair value of the investment in the debtor by stock claimant Lazar Karapantso is $1,811.08.

36. As to the stock claim of Ernest Pollak (certificate number 31 for 9 shares):

[fol. 328] a. During the month of December 1952 Ernest Pollak transferred cash totalling $9,000 for an interest in the debtor.

b. Between February 2, 1953 and May 1, 1953 Ernest Pollak received back $600 in cash.

c. The net fair value of the investment in the debtor by stock claimant Ernest Pollak is $8,400.

37. As to the stock claim of H. Lawrence Laupheimer (certificate number 23 for 8 shares):

a. Between October 18, 1951 and February 3, 1953 H. Lawrence Laupheimer transferred cash and valuable equities totalling $7,750 for an interest in the debtor.

b. Between November 1, 1951 and April 1, 1953 H. Lawrence Laupheimer received back $1,794.45 in cash.

c. The net fair value of the investment in the debtor by stock claimant H. Lawrence Laupheimer is $5,955.55.

38. As to the stock claim of Arnold A. Weinstein (certificate number 18 for 7 shares):

a. On September 19, 1951 Arnold A. Weinstein transferred cash totalling $7,000 for an interest in the debtor.

[fol. 329] b. Between November 1, 1951 and May 1, 1953 Arnold A. Weinstein received back $2,216.54 in cash.

c. The net fair value of the investment in the debtor by stock claimant Arnold A. Weinstein is $4,783.46.

39. As to the stock claim of Aaron Fried (certificate number 25 for 3 shares):

a. Between December 7, 1951 and October 20, 1952 Aaron Fried transferred cash totalling $3,000 for an interest in the debtor.

b. Between January 2, 1952 and May 1, 1953 Aaron Fried received back $683.41 in cash.

c. The net fair value of the investment in the debtor by stock claimant Aaron Fried is $2,316.59.

40. As to the stock claim of George Bond (certificate number 48 for 1 share):

a. On February 27, 1953 George Bond transferred cash totalling $1,000 for an interest in the debtor.

b. Between April 1, 1953 and May 1, 1953 George Bond received back $33.34 in cash.

[fol. 330] c. The net fair value of the investment in the debtor by stock claimant George Bond is $966.66.

41. As to the stock claim of Tess J. Schwartz (certificate number 60 for 3 shares):

a. On March 17, 1953 Tess J. Schwartz transferred cash totalling $3,000 for an interest in the debtor.

b. The net fair value of the investment in the debtor by stock claimant Tess J. Schwartz is $3,000.

42. As to the stock claim of Cydney Grosman (certificate number 61 for 2 shares):

a. On March 25, 1953 Cydney Grosman transferred cash totalling $2,000 for an interest in the debtor.

b. Between April 1953 and June 1953 Cydney Grosman received back $72.22 in cash.

c. The net fair value of the investment in the debtor by stock claimant Cydney Grosman is $1,927.78.

43. As to the stock claim of Rose Kaplan (certificate number 40 for 1 share):

[fol. 331] a. On February 17, 1953 Rose Kaplan transferred cash totalling $1,000 for an interest in the debtor.

b. On about February 23, 1953 Rose Kaplan received back $16.67 in cash.

c. The net fair value of the investment in the debtor by stock claimant Rose Kaplan is $983.33.

44. As to the stock claim of Robert A. Noire (certificate number 58 for 5 shares):

a. On March 16, 1953 Robert A. Noire transferred cash totalling $5,000 for an interest in the debtor.

b. The net fair value of the investment in the debtor by stock claimant Robert A. Noire is $5,000.

45. As to the stock claim of Harry Forman (certificates numbered 59 and 73 for 10 shares):

a. Between March 20, 1953 and April 23, 1953 Harry Forman transferred cash totalling $10,500 for an interest in the debtor.

[fol. 332] b. On May 5, 1953 Harry Forman received back $500 in cash.

c. The net fair value of the investment in the debtor by stock claimant Harry Forman is $10,000.

46. As to the stock claim of Richard S. Hull (certificates numbered 8 and 62 for six shares):

a. Between August 25, 1951 and October 4, 1951 Richard S. Hull transferred cash totalling $3,600 for an interest in the debtor.

b. Between October 1, 1951 and May 1, 1953 Richard S. Hull received back $1,200 in cash.

c. The net fair value of the investment in the debtor by stock claimant Richard S. Hull is $2,400.

47. As to the stock claim of Herbert and Melvin Danciger (certificate number 74 for 11 shares):

a. On April 28, 1953 Herbert and Melvin Danciger transferred valuable equities totalling $10,946.97 for an interest in the debtor.

b. The net fair value of the investment in the debtor by stock claimants Herbert and Melvin Danciger is $10,946.97.

[fol. 333] 48. As to the stock claim of Lester Saul (certificate number 20 for 3 shares):

a. On September 21, 1951 Leslie Saul transferred cash totalling $3,000 for an interest in the debtor.

b. Between November 1951 and May 1953 Leslie Saul received back $950 in cash.

c. The net fair value of the investment in the debtor by stock claimant Leslie Saul is $2,050.

49. As to the stock claim of Jerome Fried (certificate number 15 for 3 shares):

a. Between August and September 1951 Jerome Fried transferred valuable equities totalling $2,000 for an interest in the debtor.

b. Between October 1, 1951 and April 1, 1953 Jerome Fried received back $633.46 in cash.

c. The net fair value of the investment in the debtor by stock claimant Jerome Fried is $1,366.54.

[fol. 334] 50. As to the stock claim of Seymour Forman (certificate number 49 for 15 shares):

a. Between August 28, 1952 and March 13, 1953 Seymour Forman transferred cash and valuable equities totalling $13,000 for an interest in the debtor.

b. The net fair value of the investment in the debtor by stock claimant Seymour Forman is $13,000.

51. As to the stock claim of Eskander Manoochehrian (certificates numbered 36 and 63 for 20 shares):

a. In January 1953 Eskander Manoochehrian transferred valuable equities totalling $11,395.25 for an interest in the debtor.

b. On May 1, 1953 Eskander Manoochehrian received back $177.78 in cash.

c. The net fair value of the investment in the debtor by stock claimant Eskander Manoochehrian is $11,217.47.

[fol. 335] 52. As to the stock claim of Ann Rosen (certificate number 27 for 6 shares):

a. Between December 20, 1951 and March 5, 1952 Ann Rosen transferred cash totalling $6,000 for an interest in the debtor.

b. Between January 2, 1952 and March 1953 Ann Rosen received back $1,569.43 in cash.

c. The net fair value of the investment in the debtor by stock claimant Ann Rosen is $4,430.57.

53. As to the stock claim of Frederick Katzenell (certificates numbered 51, 52, 53, 54, 55, 56 and 57 for 35 shares):

a. On September 4, 1951 Frederick Katzenell transferred valuable equities totalling $16,850 for an interest in the debtor.

b. Between November 1951 and May 1953 Frederick Katzenell received back $7,250 in cash.

c. The net fair value of the investment in the debtor by stock claimant Frederick Katzenell is $9,600.

[fol. 336]

Conclusions of Law

1. Each of the stock claimants herein is entitled to shares of stock in such proportion to all the stock to be issued to stock claimants as the net fair value of his or her investment in the debtor (as hereinafter tabulated) bears to the total investment in the debtor.

Name	*Amount*
Charles Kanter	$17,000.00
Morton Samet	1,299.86
Gertrude Klein	11,465.78
Dorothy Holober Clark	2,231.60
Barry Clark	2,683.27

Name	*Amount*
Harold Q. Masur	2,666.60
Louis Como	4,533.27
Frank Como	4,633.27
Patsy Como	7,673.34
Anne Bikales	3,333.20
Lawrence Treat	1,333.20
Dorothy Kane	2,049.99
Miriam Klein	2,783.32
Ruth Spielholz	2,573.33
Mae Bluestone	1,433.22
Gussie Schwartz	1,916.65
Harold B. Schwartz	3,691.63
Lazar Karapantso	1,811.08
Ernest Pollak	8,400.00
H. Lawrence Laupheimer	5,955.55
Arnold A. Weinstein	4,783.46
Aaron Fried	2,316.59
George Bond	966.66
Tess J. Schwartz	3,000.00
Cydney Grosman	1,927.78
Rose Kaplan	983.33
Robert A. Noire	5,000.00
Harry Forman	10,000.00
Richard S. Hull	2,400.00
Herbert and Melvin Danciger	10,946.97
Leslie Saul	2,050.00
Jerome Fried	1,366.54
Seymour Forman	13,000.00
Eskander Manoochehrian	11,217.47
Ann Rosen	4,430.57
Frederick Katzenell	9,600.00

[fol. 337] II. Any alternative claim interposed by a stock claimant herein for the return of any consideration given or paid for stock in the debtor should be disallowed and dismissed.

III. Objections by whomsoever filed in opposition to the stock claims dealt with by these findings and conclusions should be sustained to the extent indicated herein and otherwise overruled.

IV. Counterclaims by whomsoever filed against the stock claimants whose stock claims are herein dealt with for the recovery of consideration for the stock claimed should be disallowed and dismissed.

V. Stock claims herein dealt with should be subject to counterclaims by whomsoever filed, if any, when proved, other than those counterclaims which should be disallowed and dismissed as provided in the preceding paragraph.

Settle an order consistent herewith.

....., United States District Judge.

Dated: New York, New York, October 19, 1960.

[fol. 338] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Findings of Fact and Conclusions of Law Dated November 7, 1960 and Filed November 23, 1960

[fol. 339] SUGARMAN, D.J.:

Discussion

After a hearing on June 14, 1960 the district court made its order from the bench (S.M. 10,534) imposing certain terms and conditions for the continuation of the debtor in possession and operation by it of its business and management of its property in this Chapter X reorganization proceeding.

The order, predicated upon sections 188 and 189 of the Bankruptcy Act, allowed the debtor to remain in possession and to continue to operate its business upon condition that

"(a) Jerome Fried will be discharged from the debtor's employ at once. (b) Arnold A. Weinstein, president of the debtor, shall have nothing further to do with the operation of its business and affairs, and management of its property. (c) No funds of the debtor shall be disbursed except on the counter signature of Martin H. Philip as treasurer, whose election is hereinafter confirmed. (d) Pending the approval by the court of the employment of a general manager of the debtor, Martin H. Philip shall supervise its affairs."

At the hearing on June 14, 1960 the district court also granted a motion filed on August 25, 1958 confirming an election of directors and officers of the debtor held on August 4, 1958.

[fol. 340] At that hearing on June 14, 1960 the district court refused to reopen a determination made five months before after a hearing on January 4, 1960 terminating the compensation of Weinstein and Fried for having, while fiduciaries, dealt in the debtor's stock. The district court denied an application by the debtor's counsel for a stay (S.M. 10,543).

On June 20, 1960 Weinstein and Fried appealed.

They seek review of the prohibition against their continuing to participate in the operation of the debtor's affairs, of the termination of their compensation decided on January 4, 1960, no order on which was settled by the district court, and of the approval, on which findings of fact and conclusions of law were filed on August 1, 1960, of the election of Martin J. Philip, one of the several officers and directors elected on August 4, 1958.

Appellants were granted a stay by the Court of Appeals, which entered its order on July 12, 1960, staying the "four terms and conditions specified in the District Court's order of June 14, 1960".

It is assumed that the respondents on the appeal requested that the Court of Appeals remand the matter to the district court to make "further findings of fact and [fol. 341] conclusions of law". Instead, the district court was granted leave without formal remand to make such findings and conclusions if it so desired.

Inasmuch as the district court order of June 14, 1960 is predicated upon sections 188 and 189 of the Bankruptcy Act, as aforesaid, it granted relief not specifically sought by any party to the proceeding and said order was made *sua sponte* by the district court. The relief ordered was an alternative to a welter of applications, some of which in some respects overlapped others, then pending before the court. It is believed that findings and conclusions will clarify upon the review on appeal what the district court did on June 14, 1960 and they will for that reason be set forth *infra*.

To make the district court's reasons for the order of June 14, 1960 better understood, an analysis of the motions pending before it on June 14, 1960 is appropriate. It is presented as a preface to the findings of fact and conclusions of law.

Inceptively, however, the district court deals with the suggestion by the Court of Appeals that the district court consider the appointment of a trustee under section 159 [fol. 342] of the Bankruptcy Act. It did consider that alternative and abandoned it in the belief that the best interests of the creditors and stockholders would not be served by the appointment of a trustee at this late stage of the proceeding. The reorganization attempted herein is intended in the main to determine the interests of various stock claimants to the common stock of the debtor, a Pennsylvania corporation, operating a farmers' market in Nazareth, Pennsylvania.

Without going into detail, it is briefly recited that one John Malakoff, now deceased, was the entrepreneur who set up the debtor, acquired its property and sold interests therein. Although only 200 shares of stock were authorized by the debtor's charter, Malakoff undertook to distribute 316 shares to 41 claimants. The claims of a group of stockholders, colloquially known as the "Margolis group", were disallowed by a referee in bankruptcy on October 9, 1957, to whom the entire contest of stock interests was originally referred on January 5, 1955. That referee's decision is still awaiting the district court's review. The Margolis interests represented 54 shares claimed by 5 claimants. On March 20, 1958 the district court recalled from the referee

the determination of the balance of the stock interest claims [fol. 343] and tried them all itself over a period of approximately 86 trial days between May 19, 1958 and May 7, 1959. On October 19, 1960, it made its findings and conclusions as to the stock interests in the debtor of the remaining 36 claimants with respect to the balance of 262 shares claimed by them.

Knowing, on June 14, 1960, that within a relatively short period of time the review of the referee's decision on the Margolis stock interests and the court's decision as to the balance of the stock interests would be resolved the district court felt that no gainful purpose could be achieved by appointing a trustee after almost seven years of management by the debtor in possession but that such appointment would saddle the debtor with needless additional expense and in all probability compound an already complicated condition. Thus no trustee has as yet been appointed, although an examiner was appointed pursuant to section 168 of the Bankruptcy Act and has served as such since October 3, 1956.

Reverting to the discussion of what confronted the district court on June 14, 1960 when it conditioned the debtor's continued possession and operation of its business upon the four terms aforesaid, the following appears to be the record:

[fol. 344] On September 28, 1953, a petition was filed under Chapter X of the Bankruptcy Act for the debtor's reorganization. Judge Holtzoff, then sitting in the Southern District of New York, to whom the said petition was referred, made an order permitting the debtor to remain in possession and it has been in possession since.

During the course of the ensuing proceedings certain disputes arose between the management of the debtor and a group of alleged shareholders, colloquially referred to as the "Rehrig group", stemming from the alleged refusal of the management of the debtor to give Rehrig, a meat merchant in the market, fair consideration as to space, rental, etc. Control of the debtor was sought to be obtained by each side by an acquisition of the interests of various putative stockholders.

Many motions of different sorts were brought before the court at various times by the Rehrig interests. Those which are pertinent to June 14, 1960 are severally analyzed in schedules appended hereto which briefly recite the petitions presented, the relief sought and the disposition made. [fol. 345] The first of these petitions in point of time was a motion filed August 25, 1958, based upon a petition verified August 6, 1958, returnable September 8, 1958, that the court approve an election of directors and officers of the debtor held in Philadelphia on August 4, 1958. That motion was finally granted at the hearing on June 14, 1960 (S.M. 10,536). Findings of fact and conclusions of law in support of that order were made on August 1, 1960. The district court's reasons for delay in deciding this and other pending applications and for finally undertaking to decide them on June 14, 1960 are set forth in the minutes of the hearing of that date (S.M. 10,490 and 10,532).

The next motion in part before the court on June 14, 1960 was one brought on by an order to show cause granted March 16, 1959 on a petition verified March 13, 1959, originally returnable March 23, 1959. That application sought relief under section 249 of the Bankruptcy Act. The details as to the two branches of relief sought, the disposition made and the history of that petition are briefly set forth in the appended schedule dealing with that petition. It is pointed out, however, that the first branch (A) of the March 13, 1959 petition was, on January 4, 1960, ruled upon when a decision was made that the compensation of [fol. 346] Weinstein and Fried *in futuro* be terminated for their having, as fiduciaries, dealt in the stock of the debtor.

It was directed that an order be settled on that decision and one was submitted but its signing was held in abeyance because no substitute management was then immediately available and the district court expected that upon the resolution of the stock claimants' interests new management could be selected by the stockholders. Hence the referee was instructed to continue to countersign Weinstein's and Fried's salary checks until an order was settled. He continued to do so until the order of June 14, 1960 ending Weinstein's and Fried's management of the debtor. Although the Court of Appeals stayed the district court's

order disassociating Weinstein and Fried from participation in the debtor's management and they have continued to participate therein since the stay was granted, they have not drawn any salary since June 14, 1960.

As appears from the notations at the foot of the column headed "Remarks" on the schedule dealing with the March 13, 1959 petition, Weinstein's attempt on June 14, 1960 to reopen and have reconsidered the ruling of January 4, 1960 and to interpose an additional defense thereto, were denied by the district court (S.M. 10,485, 10,488 and 10,526). [fol. 347] It may also be noted from the said schedule that there was also before the court on June 14, 1960 the resolution of the second branch (B) of the March 13, 1959 petition upon which decision had been reserved on January 28, 1960.

The next motion in point of time which was before the court on June 14, 1960 was that brought on by order to show cause granted January 7, 1960 upon a petition verified January 5, 1960, originally returnable January 18, 1960. The first branch (A) of this application sought the removal of Weinstein, Laupheimer and Fried as officers, directors and general manager, as the case might be, of the debtor, for malfeasance in office. The basis of the malfeasance was originally sixfold, i.e., (1) their having traded in the debtor's stock while fiduciaries (which it should be noted was the same basis as supported the earlier petition of March 13, 1959); (2) the diversion or embezzlement of the debtor's property; (3) the unauthorized paving of the debtor's parking lot (which had subsequently been approved by the district court); (4) the unauthorized borrowing by the debtor of $30,000 from Carty (which has subsequently been approved by the district court and affirmed by the Court of Appeals [280 F.2d 891, July 18, 1960]); (5) the unauthorized construction of an office at [fol. 348] the debtor's market (which had subsequently been approved by the district court); and (6) the improper solication of the acceptance of a plan (which was withdrawn at the hearing on January 28, 1960).

As appears from the notation on the schedule dealing with the January 5, 1960 petition the branch thereof de-

nominated (B) was withdrawn by the petitioner and decision was reserved on January 28, 1960 on the branch designated (A) so that said branch (A) was before the court for final resolution on June 14, 1960.

Another matter before the court on June 14, 1960 was an order to show cause also granted on January 7, 1960 but upon a petition verified January 6, 1960. As appears by the appended schedule dealing with that motion, it was originally adjourned sine die on January 25, 1960, restored for consideration on June 14, 1960, then set down for hearing on September 26, 1960, at which time the respondents were given leave to interpose answers, etc. and the matter came on for further hearing on November 2, 1960.

As will appear from the foregoing and from the schedules of the various motions brought on by the Rehrig interests, decision was reserved on January 28, 1960 on a number of matters which were again before the district court on June [fol. 349] 14, 1960 by virtue of the district court having granted a new order to show cause on May 31, 1960 upon a petition verified May 27, 1960, returnable June 14, 1960, that cause be shown why the matters then pending and unresolved should not be forthwith determined.

As the schedule appended, dealing with the petition of May 27, 1960 shows, the district court: (A)(1) refused to disturb its order of January 4, 1960 terminating Weinstein's and Fried's compensation for having violated section 249 of the Bankruptcy Act by having dealt in the stock of the debtor while fiduciaries of the debtor, (2) refused, despite their violation of section 249 of the Bankruptcy Act, to direct them to return to the debtor prior compensation and reimbursed expenses received by them from the debtor; (B)(1)(a) adjourned the application for the removal of Laupheimer as secretary-treasurer of the debtor because by the simultaneous approval of the elections held on August 6, 1958 Laupheimer ceased to be the secretary-treasurer of the debtor, (b) held that it lacked power to remove Weinstein as president and director of the debtor, (c) granted the application for Fried's removal as general manager of the debtor, (d) *solely* because they had violated [fol. 350] section 249 of the Bankruptcy Act by trading in the debtor's stock and upon no other basis, directed that

Weinstein and Fried no longer have any voice in the management of the debtor's affairs as a condition of the debtor remaining in possession, (2)(a) limited the basis of the termination of compensation and reimbursed expenses to Weinstein and Fried to the first of the alleged bases of misconduct, to wit, their having traded in the stock of the debtor while fiduciaries of the debtor in violation of section 249 of the Bankruptcy Act, (b) denied recoupment of past compensation and reimbursed expenses upon any alleged basis; (C) set for hearing on September 26, 1960 (later adjourned to November 2, 1960) that portion of the petition of May 27, 1960 as addressed itself to the petition of January 6, 1960 that dealt with a lease between the debtor and Nazareth Enterprises, Inc. Although the petition of January 6, 1960, as will appear from the schedule thereon, was adjourned sine die at the hearing on January 25, 1960 and restored on June 14, 1960 for hearing, a new petition was filed on June 30, 1960 seeking the same relief as (B) in the petition of January 6, 1960 but against Weinstein and Fried and the same relief as (C) in the petition of January 6, 1960 but against Weinstein, Fried and Nazareth Enterprises, Inc. No schedule thereon is in- [fol. 351] corporated herein because the new show cause order came into being subsequent to June 14, 1960, the crucial day so far as the present discussion is concerned; (D) granted the petition of August 6, 1958 approving the election of directors and officers of the debtor as set forth in the schedule dealing with that petition.

In residue, therefore, it would appear that only three determinations resulted on June 14, 1960. First, the approval of the election of the debtor's officers and directors held on August 4, 1958, from part of which appeal has been taken; second, the denial of Weinstein's application to reopen the proceedings initiated by the petition of March 13, 1959, resulting in the termination of his and Fried's future compensation on January 4, 1960 for violation of section 249 of the Bankruptcy Act; and, third, making the debtor's continued possession conditioned upon Weinstein's and Fried's disassociation from the management of its affairs solely because they, as fiduciaries, violated section 249 of the Bankruptcy Act by dealing in the debtor's stock.

Based upon the forgoing discussion the district court now makes such additional findings of fact and conclusions of law as are deemed necessary.

[fol. 352]

As to the approval of the election of officers and directors on August 4, 1958

Adequate findings of fact and conclusions of law were made and filed on August 1, 1960.

As to the refusal of the district court to reconsider its termination of the compensation of Weinstein and Fried

1. The district court's memorandum decision filed January 4, 1960, in which the referee's dismissal of the proceeding brought under section 249 of the Bankruptcy Act was disapproved, adequately states the pertinent facts and law sustaining the decision that compensation cease *in futuro*.

2. No findings of fact or conclusions of law are appropriate as to the district court's exercise of its discretion in denying a reconsideration of the decision of January 4, 1960 terminating Weinstein's and Fried's compensation.

As to the continuation of the debtor's possession being predicated upon the disassociation of Weinstein and Fried from the debtor's management

Findings of Fact

1. Alternate management of the debtor became available by the approval of the election of debtor's officers and [fol. 353] directors held on August 4, 1958.

2. Weinstein and Fried as president and general manager of the debtor were fiduciaries of the debtor.

3. During their tenure as such and during the Chapter X reorganization proceeding they dealt in the debtor's stock.

4. The debtor's best interests require that it not be managed by persons serving without compensation.

Conclusions of Law

1. The court lacked power to remove Weinstein as president of the debtor.

2. For having traded in debtor's stock as aforesaid Weinstein's and Fried's management of the debtor should cease.

3. The debtor's continued possession should be allowed only on condition that Weinstein and Fried have no further voice in its management.

Sidney Sugarman, United States District Judge.

Dated: New York, New York, November 7, 1960.*

[fol. 354] * At the hearing which commenced on November 2, 1960, addressed to the petition for cancellation or rejection of the lease to the debtor's race track now held by Nazareth Enterprises, Inc., and for an accounting initiated by the petition of January 6, 1960, the appellants Weinstein and Fried requested that the court withhold filing the foregoing document because the time in which to perfect their appeal began running from the date of such filing and a hardship would be imposed upon them if the findings and conclusions were filed while they were thus engaged.

DATE OF NOTICE OF MOTION	Undated - Filed August 25, 1958
BASED UPON THE PETITION VERIFIED	August 6, 1958
RETURNABLE	September 8, 1958

RELIEF SOUGHT	DISPOSITION	REMARKS
That the court approve an election of directors and officers of the debtor held in Philadelphia, Pa. on August 4, 1958.	Granted on June 14, 1960 at a hearing thereon (S.M. 10,536). Findings of fact and conclusions of law in support of the order made from the bench on June 14, 1960 filed August 1, 1960.	The court's reasons for the delay in deciding this application are set forth at the hearing on June 14, 1960 (S.M. 10,490 and 10,532).

[fol. 356]

Petition Verified March 13, 1959

DATE OF THE ORDER TO SHOW CAUSE	March 16, 1959
BASED UPON THE PETITION VERIFIED	March 13, 1959
RETURNABLE	March 23, 1959

RELIEF SOUGHT	DISPOSITION	REMARKS
(A) - That hereafter in this proceeding no compensation or reimbursement of expenses be allowed or paid to Weinstein, Laupheimer, Fried or Nazareth Enterprises, Inc. or any of them pursuant to § 249 of the Bankruptcy Act. (B) - That Weinstein, Laupheimer, Fried and Nazareth Enterprises, Inc. and each of them account to this court for all compensation and reimbursement of expenses received by them from the debtor for the period from and after September 28, 1953, and that Weinstein, Laupheimer, Fried and Nazareth Enterprises, Inc. and each of them, restore to the debtor, and that the debtor recoup from each of them, all such compensation and reimbursement, pursuant to § 249 of the Bankruptcy Act.	As to (A) - at a hearing on January 4 (see adjoining column headed "Remarks") a decision was made terminating the future compensation of Weinstein and Fried, the prayer for such relief against Laupheimer having been previously withdrawn by petitioner (S.M. 8,624). As to (B) - This branch was adjourned for hearing to January 28, 1960. Consolidated with "removal" branch of January 5, 1960 petition (cf. schedule thereon infra) and decision reserved on January 28, 1960. (Cf. "Disposition" column on Schedule of May 27, 1960 petition.)	On March 20, 1959 Weinstein filed an affidavit in opposition to the petition which prayed that the petition be dismissed and that the stock purchase of the affiant be approved. On April 17, 1959 an order to show cause was granted Weinstein, returnable April 27, 1959 why the petition of March 13, 1959 should not be dismissed under F.R.Civ.P. 12(b) and if dismissal be denied allowing Weinstein additional time in which to answer the petition of March 13, 1959. On June 12, 1959 an order was entered referring the original petition of March 13, 1959 and cross motion of April 17, 1959 to Referee Herzog to hear and report pursuant to § 117 of the Bankruptcy Act. On June 19, 1959 the reference was transferred to Referee Joyce who reported on November 5, 1959 recommending dismissal of the original petition of March 13, 1959. At a hearing on the Referee's report on December 21, 1959 Weinstein and Fried were directed to file answers to the original petition which they subsequently did. A further hearing on the Referee's report was held on January 4, 1960 at which the action was taken as set forth in the middle column of this schedule headed "Disposition". Although settlement of an order was directed and one was subsequently submitted its signing was held in abeyance because (1) no other management was then available and (2) it was expected that with the resolution of the stock interest claims new management could be chosen. Accordingly, the Referee was directed to continue to countersign Weinstein's and Fried's salary checks until the matter reserved for the January 18, 1960 hearing was resolved. On June 9, 1960 an order to show cause, returnable June 14, 1960, was granted Weinstein, on his affidavit of June 8, 1960, why the termination of future compensation ordered on January 4, 1960 should not be reopened and reconsidered. The motion was denied on June 14, 1960 (S.M. 10,485). The original decision was adhered to on June 14, 1960 (S.M. 10,526). Also an oral motion by Weinstein at the June 14, 1960 hearing (S.M. 10,485) to interpose an additional defense of estoppel to the petition of March 13, 1959 was denied (S.M. 10,488).

[fol. 357]

PETITION VERIFIED JANUARY 5, 1960

DATE OF THE ORDER TO SHOW CAUSE	January 7, 1960
BASED UPON THE PETITION VERIFIED	January 5, 1960
RETURNABLE	January 1 , 1960

RELIEF SOUGHT	DISPOSITION	REMARKS
(A) - That Weinstein and Laupheimer be removed as President and Secretary-Treasurer respectively and as Directors and that Fried be removed as General Manager of the debtor for malfeasance, to wit: having traded in debtor's stock; diversion or embezzlement of the debtor's property; unauthorized paving of debtor's parking lot; unauthorized borrowing by debtor of $30,000 from Carty; unauthorized construction of an office at debtor's market; improper solicitation of acceptance of a plan.	(A) - Consolidated for hearing with "recoupment" branch of March 13, 1959 petition. Decision reserved on January 28, 1960. (Cf. "Disposition" column on Schedule of May 27, 1960 petition.) At the hearing on January 28, 1960 petitioner withdrew the "improper solicitation" branch of his petition.	Note that this order was procured during the period between the January 5, 1960 hearing, when the termination of future compensation of Weinstein and Fried had been ordered and recoupment under the March 13, 1959 petition under § 24[illegible] of the Bankruptcy Act had been adjourned to January 1[illegible], 1960. Weinstein and Fried filed answers to this January 5, 1960 petition on January 18 and 19 respectively and Laupheimer adopted Weinstein's answer as his at the hearing (S.M. 9,868). A consolidated hearing was held from January 25 through 2[illegible], 1960 on the adjourned "recoupment" (A) branch of the petition of March 13, 1959 and on the "removal" (A) branch of the January 5, 1960 petition (adjoining column headed "Relief Sought"). The court's reasons for the delay in deciding this application are set forth at the hearing on June 14, 1960 (S.M. 10,490 and 10,532).
(B) - That Weinstein, Fried and Nazareth Enterprises, Inc. account for compensation and reimbursement of expenses received by them from the debtor and that they restore all such compensation and reimbursements.	(B) - Withdrawn by petitioner at hearing on January 25, 1960 (S.M. 9,[illegible]44).	

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fol. 358]

PETITION VERIFIED JANUARY 6, 1960

PETITION VERIFIED JANUARY 6, 1960.

DATE OF THE ORDER TO SHOW CAUSE	January 7, 1960
BASED UPON THE PETITION VERIFIED	January 6, 1960
RETURNABLE	January 18, 1960

RELIEF SOUGHT	DISPOSITION	REMARKS
(A) - That a lease dated August 8, 1952 between the debtor, as lessor and one Sherman, as lessee, assigned by Sherman to Nazareth Enterprises, Inc. be cancelled and rejected. (B) - That Jerome Fried and Nazareth Enterprises, Inc. account for monies received from conducting racing at the debtor's property and from James LaGrotte or J. & J. Foods, Inc. (C) - That debtor have judgment against Fried and Nazareth Enterprises, Inc. for any amounts found due under the accounting.	At the hearing on January 25, 1960 this entire motion was adjourned sine die (S.M. 9,955) to await decision of other matters (cf. appended schedules dealing with January 5, 1960 petition and March 13, 1959 petition) upon which decision was reserved on January 28, 1960. On June 14, 1960 this motion was restored for hearing on September 26, 1960. On September 26, 1960 the hearing was adjourned to November 2, 1960.	Note that this order was procured during the period between the January 4, 1960 hearing when the termination of future compensation of Weinstein and Fried had been ordered and recoupment under the March 13, 1959 petition under § 249 of the Bankruptcy Act had been adjourned to January 18, 1960. Note further that this show cause order was granted the same day (January 7) returnable the same day (January 18) as the one seeking the removal of Weinstein, Laupheimer and Fried, as officers, directors and general manager of the debtor and an accounting and restoration to the debtor by Weinstein, Fried and Nazareth Enterprises, Inc. of compensation and reimbursed expenses received by them from the debtor.

[fol. 359]

Petition Verified May 27, 1960

DATE OF THE ORDER TO SHOW CAUSE	May 31, 1960
BASED UPON THE PETITION VERIFIED	May 27, 1960
RETURNABLE	June 14, 1960

RELIEF SOUGHT	DISPOSITION	REMARKS
That petitions then pending, i.e.,	At the hearing on June 14, 1960:	
(A) Petition of March 13, 1959 for termination and recoupment of compensation pursuant to § 249 of the Bankruptcy Act;	(A) 1 - Termination of compensation for violation of § 249 of Bankruptcy Act had been granted on January 4, 1960. 2 - Recoupment of compensation and reimbursed expenses for violation of § 249 of Bankruptcy Act denied (S.M. 10,533).	
(B) Petition of January 5, 1960 for removal of President, Secretary-Treasurer, Directors and General Manager of the debtor for misconduct in office	(B) 1a - So much as sought removal of Laupheimer as Secretary-Treasurer and Director of debtor for misconduct was adjourned because his tenure as such ended upon the granting (infra) of the petition of August 6, 1960 approving an election of other directors and officers of the debtor. b - As to so much as sought removal of Weinstein as President and Director of debtor for misconduct the court held it lacked the power to do so. c - As to so much as sought removal of Fried as General Manager of debtor for misconduct the court granted the application. d - But solely because Weinstein and Fried had, while fiduciaries, dealt in debtor's stock, in violation of § 249 of the Bankruptcy Act. The	
	debtor was allowed to remain in possession (§ 188 Bankruptcy Act) upon conditions that "(a) Jerome Fried will be discharged from the debtor's employ at once. (b) Arnold A. Weinstein, president of the debtor, shall have nothing further to do with the operation of its business and affairs, and management of its property. (c) No funds of the debtor shall be disbursed except on the counter-signature of Martin H. Philip as treasurer, whose election is hereinafter confirmed. (d) Pending the approval by the court of the employment of a general manager of the debtor, Martin H. Philip shall supervise its affairs."	
and for termination and recoupment of compensation;	2a - As to so much as sought termination of compensation and reimbursed expenses for misconduct, it was held on June 14, 1960 that anything beyond violation of § 249 of the Bankruptcy Act was moot because of the termination of compensation ordered on January 4, 1960 for that violation. b - So much as sought recoupment of compensation and reimbursed expenses for any alleged misconduct was at this hearing denied.	
(C) Petition of January 6, 1960 for cancellation of lease held by Nazareth Enterprises, Inc. and for accounting thereon and for judgment on the accounting and	(C) Set for hearing on September 26, 1960.	
(D) Petition of August 6, 1960 for approval of election of directors and officers of the debtor;	(D) Granted (S.M. 10,536 et seq.).	
be granted.		

[fol. 360] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF SETTLEMENT—Filed December 9, 1960

Sirs:

Please Take Notice that the within Order Resolving Objections to Proofs of Stock Interests will be presented for settlement and signature herein to the Honorable Sidney Sugarman, one of the Judges of the within named Court, at the office of the Clerk of this Court, Room 601, United States Courthouse, Foley Square, New York, New York, on the 5th day of December, 1960, at 10:30 A.M.

Dated: New York, New York, November 25, 1960.

Charles Seligson, Examiner, 350 Fifth Avenue, New York 1, New York.

To:

Alex Rosen, Esq., Attorney for Debtor and Debtor in Possession, 225 Broadway, New York 7, New York.

Arnold Weinstein, Esq., 225 Broadway, New York 7, New York.

[fol. 361] Melvin L. Robbins, Esq., Attorney for Irving J. Wolf, Richard Hull, et al., 9 East 40th Street, New York 16, New York.

Benjamin Margolis, Esq., Attorney for Ida Mae Margolis, Sarah Kason, Bernard Unger and William McK Schongut, 271 North Avenue, New Rochelle, New York.

Jerome Fried, c/o Nazareth Fairgrounds & Farmers Market Inc., Post Office Box 293, Nazareth, Pennsylvania.

Louis Patur, Esq., Attorney for Seymour Forman, 11 Park Place, New York, New York.

Leonard Franklin, Esq., Attorney for Herbert & Melvin Danciger, 19 East 53rd Street, New York, New York.

Richard Hull, Esq., Attorney for Ernest Pollak, 41 Longview Road, Port Washington, L. I., New York.

Sam Lipson, Esq., Attorney for Jerome Fried and Nazareth Enterprises, 10 East 40th Street, New York 16, New York.

Meyer Kraushaar, Esq., Attorney for Aaron Fried, 42 Broadway, New York 4, New York.

Herman R. Agins, Esq., Attorney for Morton Samet, 285 Madison Avenue, New York 17, New York.

Harold Q. Masur, Esq., Attorney for Lawrence Treat, 520 East 20th Street, New York, New York.

[fol. 362] Bernard Buchwald, Esq., Attorney for Dorothy Holober Clark, Barry Clark, Harold Q. Masur, Gussie Schwartz, Harold B. Schwartz, George Bond, Tess J. Schwartz, Cydney Grosman and Lazar Karapontso, 16 West 46th Street, New York, New York.

Michael Berman, Esq., Attorney for Louis Como, Frank Como and Patsy Como, 37 Wall Street, New York 5, New York.

Maurice Harbater, Esq., Attorney for Charles Kanter, 373 West 52nd Street, New York, New York.

Jacob Weiswasser, Esq., Attorney for Anne Bikales and Mae Bluestone, 261 Broadway, New York 7, New York.

Gertrude Klein, 280 Collins Avenue, Mt. Vernon, New York.

Miriam Klein, c/o Gertrude Klein, 280 Collins Avenue, Mt. Vernon, New York.

Ruth Spielholz, 12 South 15 Avenue, Mt. Vernon, New York.

H. Lawrence Laupheimer, 20 Fara Drive, Stamford, Connecticut.

Rose Kaplan, 15 Crary Avenue, Mt. Vernon, New York.

Robert A. Noire, 186 East 164th Street, Bronx, New York.

Harry Forman, 32-42 91st Street. Jackson Heights, L. I., New York.

Eskander Manoochehrian, Windsor Mansion, Hartsdale, New York.

[fol. 363]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER RESOLVING OBJECTIONS TO PROOFS OF STOCK INTERESTS—December 8, 1960

At New York, in said district, on the 8th day of December, 1960.

Nazareth Fairgrounds & Farmers Market, Inc., the above named debtor, having filed a petition for reorganization herein on the 28th day of September 1953; and the said debtor having been continued in possession of its property and authorized to operate its business and manage its property, pending the further order of this court; and said debtor being presently in possession of its property and presently operating its business and managing its property; and said debtor having been incorporated under the laws of the Commonwealth of Pennsylvania on or about the 7th day of August 1951, with an authorized capitalization of 200 shares of no par value common stock, and

[fol. 364] An order having been made herein on or about the 5th day of January 1955 providing for the filing of proofs of stock interests, as well as proofs of claims of creditors; and 41 proofs of stock interests having been filed herein for a total of 316 shares of the capital stock of said debtor, of which five proofs of stock interests for an aggregate of 54 shares of the capital stock of the debtor were filed by Benjamin Margolis, Ida Mae Margolis, Sarah Kason, Bernard Ungar and William McK Schongut (hereinafter referred to as the Margolis group); and objections having been filed by the debtor to the allowance of the proofs of stock interests of the Margolis group, and such

objections having been referred to a referee in bankruptcy herein to hear and determine, and said referee having determined that the said proofs of stock interests of the Margolis group should be disallowed in toto and having entered an order in accordance with such determination, and a petition to review having been filed by the Margolis group, and the court having reserved decision thereon, and

Objections having been filed by the debtor herein on or about the 6th day of November 1957 to the allowance of the remaining 36 proofs of stock interests for 262 shares of the capital stock of the debtor, which objections included affirmative defenses and counterclaims; and such counterclaims, except as to Richard Hull and Jerome Frigd, having sought generally the recovery of $1,000 per share from each claimant held entitled to a stock interest in the debtor; [fol. 365] and the counterclaims against Richard Hull having sought the recovery of $1,000 per share or such other balance as the court deemed proper, in the event such claimant was held to be a stockholder, and the recovery of $261,811.78 and an accounting for damages to the debtor resulting from claimant's breach of trust; and such counterclaims against Jerome Fried having sought the recovery of $1,000 per share or such other balance as the court deemed proper in the event such claimant was held to be a stockholder, and the recovery of $314,012.78 and an accounting for damages to the debtor resulting from the improper diversion of assets of the debtor to which claimant was a party and the cancellation of a certain lease with respect to the operation of automobile races on the premises of the debtor owned by claimant or by Nazareth Enterprises Inc., a corporation owned or controlled by claimant; and additional objections to the allowance of certain of the proofs of stock interests having been filed herein by Benjamin Margolis, and hearings on the said objections having been duly noticed, and such hearings on the said objections having extended over a period of approximately 86 days, commencing on or about the 19th day of May 1958 and terminating on or about the 7th day of May 1959, and all of the claimants having appeared at the said hearings in person or by attorney, and

An order having been entered herein on or about the 3rd day of October 1956, pursuant to Section 168 of the Bankruptcy Act, appointing Charles Seligson as Examiner to perform the duties imposed upon a trustee under Paragraph 1 through 5 of Section 167 of the said Act; and the [fol. 366] Examiner, at the request of the court, having participated in the hearings upon the objections to the allowance of the said proofs of stock interests; and the court having, on the 19th day of October 1960, made its Findings of Fact and Conclusions of Law on the objections to the allowance of all proofs of stock interests other than the proofs of stock interests of the Margolis group, and the court having concluded that counterclaims for the recovery of consideration for the shares of stock of the debtor claimed by each stock claimant should be disallowed and dismissed but that stock claims should be subject to any other kind of counterclaims.

Now, upon the proofs of stock interests (other than those of the Margolis group) filed herein pursuant to the order of this court of the 5th day of January 1955, the objections to the allowance of such proofs of stock interests filed herein by Nazareth Fairgrounds & Farmers Market, Inc., the above named debtor, and by and on behalf of the Margolis group, and upon all the proceedings had before me at the said hearings, including without limitation all testimony taken and exhibits received, and upon the Findings of Fact and Conclusions of Law of this court filed herein the 19th day of October 1960, and sufficient reason and good cause appearing to me therefor: it is

Found, Ordered, Adjudged and Decreed

[fol. 367] 1. That each of the stock claimants hereafter named is the owner of the capital of Nazareth Fairgrounds & Farmers Market, Inc., the debtor herein, in such proportion to the total capital of the debtor as the net value of the investment of each such stock claimant in the debtor (as hereinafter tabulated) bears to the total investment in the debtor, as herein or hereafter found and determined, and to that extent is deemed to be a stockholder of the debtor for all purposes in the within reorganization proceeding and is entitled to shares of stock of the debtor calculated on that basis:

Name	*Amount*
Charles Kanter	$17,000.00
Morton Samet	1,299.86
Gertrude Klein	11,465.78
Dorothy Holobef Clark	2,231.60
Barry Clark	2,683.27
Harold Q. Masur	2,666.60
Louis Como	4,533.27
Frank Como	4,633.27
Patsy Como	7,673.34
Anne Bikales	3,333.20
Lawrence Treat	1,333.20
Dorothy Kane	2,049.99
Miriam Klein	2,783.32
Ruth Spielholz	2,573.33
Mae Bluestone	1,433.22
Gussie Schwartz	1,916.65
Harold B. Schwartz	3,691.63
Lazar Karapantso	1,811.08
Ernest Pollak	8,400.00
H. Lawrence Laupheimer	5,955.55
Arnold A. Weinstein	4,783.46
Aaron Fried	2,316.59
George Bond	966.66
Tess J. Schwartz	3,000.00
Cydney Grosman	1,927.78
Rose Kaplan	983.33
Robert A. Noire	5,000.00
Harry Forman	10,000.00
Richard S. Hull	2,400.00
Herbert and Melvin Danciger	10,946.97
Leslie Saul	2,050.00
[fol. 368] Jerome Fried	1,366.54
Seymour Forman	13,000.00
Eskander Manoochehrian	11,217.47
Ann Rosen	4,430.57
Frederick Katzenell	9,600.00

2. That any alternative claim interposed or asserted by any of the said stock claimants herein for the return of all or any part of the consideration allegedly given or paid

for stock in the debtor be, and the same hereby is, denied and dismissed;

3. That any and all objections by whomsoever filed to the allowance of the said stock claims (dealt with by these Findings and Conclusions) be, and the same hereby are, sustained to the extent heretofore indicated and are otherwise overruled;

4. That any and all claims and counterclaims by or in behalf of the debtor, by whomsoever filed, against the stock claimants and their assignees, or any of them, whose stock claims are herein resolved, directed to the recovery, payment, call, or assessment of the consideration for the debtor's issuance or sale of the stock claimed by each such claimant or his assignee, or of the subscription price or purchase price of such stock, be, and the same hereby are, disallowed and dismissed;

5. That jurisdiction and decision are reserved with respect to any and all counterclaims by whomsoever filed against the stock claimants whose stock claims are herein resolved where such counterclaims are not directed to the recovery of the consideration for the stock claimed by each such claimant, and which counterclaims have not been disallowed and dismissed as provided in Paragraph 4 hereof, including without limitation the counterclaims for money damages and accountings against Richard Hull and Jerome Fried; and that nothing contained in this order shall be [fol. 369] construed to affect in any way the determination by this court, now reserved, of the allowance or disallowance of the proofs of stock interests of the Margolis group; and

6. That this court reserves full power and jurisdiction to make such further orders in the premises as it may deem necessary or appropriate.

Sidney Sugarman, United States District Judge.

[fol. 370] Affidavits of service by mail (omitted in printing).

[fol. 374]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for the Reorganization of a Corporation

No. 89669

IN THE MATTER

of

NAZARETH FAIRGROUNDS & FARMER'S MARKET, INC., Debtor.

DECISION—June 28, 1961

SUGARMAN, D. J.:

On the petition of Irving J. Wolf, as assignee of Charles Kanter and as agent and attorney-in-fact for Wilson D. Rehrig and Frederick Katzenell, verified January 6, 1960, the court on January 7, 1960 ordered Jerome Fried and Nazareth Enterprises, Inc. to show cause on January 18, 1960 why an order should not be entered

(A) that a certain lease dated August 18, 1952 between the debtor as lessor and one Joseph Sherman as lessee, assigned by the latter to Nazareth Enterprises, Inc. on April 28, 1953, be cancelled or rejected forthwith;

(B) that Jerome Fried and Nazareth Enterprises, Inc. account for all money and property received by them

(1) incident to their having conducted a racing enterprise on the property of the debtor, and

(2) from James LaGrotte or J & J Foods, Inc.;

(C) that the debtor have judgment against Jerome Fried and Nazareth Enterprises, Inc. for the amounts found due on the accounting.

[fol. 375] When the petition came on for hearing on January 25, 1960 it was adjourned *sine die*.

On May 31, 1960 an order to show cause, predicated upon the petition of Wolf, verified May 27, 1960, was granted reviving for hearing on June 14, 1960 the said application for cancellation or rejection of the lease and for accounting. On June 14, 1960 the matter was set for hearing on September 26, 1960. At the hearing on September 26, 1960 the petitioner filed an amended petition verified September 12, 1960, for cancellation or rejection of the lease and for an accounting, in which the prayer for relief was identical with that prayed for in the original petition of January 6, 1960.

At the hearing on September 26, 1960 the debtor in possession was afforded an opportunity by answer to the petition to join or oppose the application or take such other steps as it deemed appropriate.

Between the hearing on June 14 and the hearing on September 26, 1960, namely, on the first day of July, 1960, an order to show cause, based upon the petition of Irving J. Wolf, verified June 30, 1960, and returnable September 26, 1960 was granted. Under this order

(a) Arnold A. Weinstein and Jerome Fried were directed to show cause why an order should not be made that they and each of them account for all money and other property received by both or either of them and by Nazareth Enterprises, Inc. incident to the racing enterprise conducted by Jerome Fried and Nazareth Enterprises, Inc. on the debtor's property.

(b) that the debtor have judgment against Weinstein and Fried for the amounts found due upon that accounting, including unpaid rents found to be due from Nazareth Enterprises, Inc. to the debtor and amounts found to have been received by Nazareth Enterprises, Inc. and Jerome Fried from James LaGrotte and J & J Foods, Inc.

[fol. 376] At the hearing on September 26, 1960 the petitioner filed an amended petition, verified September 13, 1960, for accounting and surcharge, in which the prayer for relief is identical with that prayed for in the original petition of June 30, 1960.

At the hearing on September 26, 1960, after withdrawing from the amended petition verified September 13, 1960 (as

a basis for the relief sought in the order to show cause granted July 1, 1960) reference to a petition verified January 5, 1960 (S. M. 10,679) the petitioner stipulated that there be a consolidation for trial of the order to show cause granted January 7, 1960 with the order to show cause granted July 1, 1960, both to be predicated upon the petitioner's amended petition verified September 12, 1960, so that the total relief sought would be—

> "Cancellation and termination of the Nazareth Enterprises, Inc., lease; accounting under the Nazareth Enterprises, Inc., lease; accounting under the J & J Foods and LaGrotte transaction against Weinstein, as an officer of the debtor, Fried, as general manager of the debtor, Fried as an individual and Nazareth Enterprises, Inc." (S. M. 10,678)

The debtor, Arnold Weinstein, Jerome Fried and Nazareth Enterprises, Inc. having filed answers (the last two of which asserted a counterclaim against the debtor for the expenditure of money for repairs to the race track on the debtor's property which is the subject matter of the lease herein, to which counterclaim petitioner, but not the debtor, replied) the consolidated orders to show cause came on for hearing on November 2, 1960 and continued for ten trial days intermittently until November 22, 1960.

Preliminarily it becomes necessary for the court to dispose of the defenses pleaded by the respondents which do not go to the merits. Respondent Nazareth Enterprises, Inc. in its answer raises certain specific defenses, which are dealt with *in limine:*

[fol. 377] (1) That the petitioner failed to set forth a claim upon which relief can be granted. Sufficient has been developed in the hearing to warrant that this defense be and it is overruled.

(2) Petitioner has no standing to maintain this proceeding. I am satisfied that under §206 of the Bankruptcy Act [11 U. S. C. §606] the petitioner, without the necessity of court permission to intervene, has the right to bring this proceeding.

(3) Petitioners principal is not a stockholder of the debtor and the petition is premature. I have heretofore held that the petitioners principals have a financial interest in the debtor and I have specifically found that to be the fact. Accordingly, this defense is overruled.

(4) The court lacks jurisdiction to summarily determine rights under a lease antedating the Chapter X proceeding. While the instrument in question has all the earmarks of a lease, it is in essence no more than a license to operate automobile exhibitions on certain days on a limited portion of the debtor's property constituting the race track. The entire premises have at all times been in the possession or under the control of the debtor in possession and that was so when the reorganization petition was filed herein. Possession is the touchstone of summary jurisdiction and the debtor's possession at the date of the filing of the reorganization petition, vests this court with jurisdiction in this reorganization proceeding to determine the issues raised here concerning the validity of the "lease". *Thompson* v. *Magnolia Petroleum Co. et al.*, 309 U. S. 478 (1940). Jurisdiction over the subject matter draws to it jurisdiction to determine the rights of all persons who claim or assert any interest in the *res*. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931); *In re Wilka*, 131 Fed. 1004 (N. D. Iowa 1904). It is therefore immaterial that Nazareth Enterprises, Inc. and Fried are both non-resi- [fol. 378] dents of the Southern District of New York. This defense is overruled.

(5) Petitioner and the debtor are barred from proceeding by a two-year limitation. Although pleaded in the answer, the respondent Nazareth Enterprises, Inc. does not touch upon this issue in its brief. In view of my finding *infra* that there was no fraud in the inception or the extension of the term of the agreement, it becomes moot whether the within proceeding is time barred under §11e of the Bankruptcy Act [11 U. S. C. §29(e)] or under the Pennsylvania or New York six-year statutes of limitations. However, as to the rental modification, treated with hereinafter, the action would be governed by the six-year statute of

either New York or Pennsylvania, and, as is found *infra*, that having taken place in 1956, the within proceeding is thereby not time barred.

(6) The debtor ratified the transactions referred to in paragraphs 4, 5, 6, 9, 10, 11, 16, 17 and 18 of the petition.

Paragraphs 4, 5 and 6 of the petition address themselves to the petitioner's contention that the "lease" was fraudulent in its inception. As will later appear I hold that petitioner has not borne his burden of establishing the alleged fraud, hence the alleged ratification by the debtor is of no moment.

Paragraphs 9, 10 and 11 of the petition address themselves to the unauthorized reduction in percentage rents. These paragraphs are treated together with paragraphs 16, 17 and 18 of the petition which deal with the alleged diversion of rents for the food concessions on automobile exhibition days.

In dealing therewith consideration is also given to the 11th, 12th, 13th and 14th separate and distinct defenses in respondent Nazareth Enterprises, Inc.'s answer, which, aside from the claimed ratification in this 6th defense, plead separate defenses to paragraphs 11, 16, 17, 18 and 19 of the petition.

[fol. 379]. As will be hereinafter indicated the court rejects the contention of respondent Nazareth Enterprises, Inc. that the modification of the rental payable by Nazareth Enterprises, Inc. to the debtor in possession, which the court finds occurred apparently in 1956, to be effective with the commencement of the 1957 racing season, was a transaction in the ordinary course of the business of the debtor in possession and valid without court approval. However, that aspect of the petition is of little moment because under the terms of the agreement in issue respondent Nazareth Enterprises, Inc. was required, once it elected to take over the food and drink concessions on automobile exhibition days, to pay 15% of the front-gate receipts. It must follow, therefore, regardless of the validity of the later modification, to an even lower percentage than the 12% provided in the agreement when the respondent Nazareth Enterprises, Inc. did not operate the food and drink concessions,

that the respondents Nazareth Enterprises, Inc. or Fried are accountable to the debtor in possession for the difference between the actual rental paid commencing with the 1955 racing season, when the Nazareth Enterprises, Inc. first took over the operation of the food and drink concessions and the 15% which it was required to pay in that contingency. It therefore follows that the debtor is entitled to receive from Nazareth Enterprises, Inc., for the period commencing with the 1955 racing season, the difference between what it paid and 15% of the front-gate receipts down to the present.

Without the court's approval, and solely on his own, without even consulting the other governing authorities of the debtor in possession, Weinstein, as debtor's president, had no power to accept for the racing seasons 1955 and 1956, once respondent Nazareth Enterprises, Inc., elected to operate the concessions on exhibition days, the smaller percentage (12%) provided for in the "lease" and as hereinabove and hereinafter set forth, the even further reduced percentage resulting from the so-called modification com- [fol. 380] mencing with the 1957 racing season. If Weinstein agreed without the court's permission to take only the 12% rental for the years 1955 and 1956, and if he agreed to take even a lower rental for any of the subsequent years, his agreement is not binding on the debtor in possession and there is nothing in the record to sustain the ratification which the respondent Nazareth Enterprises, Inc. asserts in its 6th defense; what could not be authorized by Weinstein in the first instance could not be ratified by the debtor without court approval.

(7) This defense in essence pleads laches on the part of the debtor in possession and the petitioner. Obviously, the estate of the debtor in possession cannot be prejudiced by any act or omission by the petitioner. Furthermore, if the respondent Nazareth Enterprises, Inc. changed its position, it did so at its own peril because as far back as November 8, 1957 it had notice that the debtor challenged the validity of the agreement in question when, in filing its objections to Jerome Fried's claim as a creditor it counterclaimed "That the lease owned by Jerome Fried,

or Nazareth Enterprises, Inc., the corporation in which said Jerome Fried owns all the stock, or controlling shares of stock, leasing a certain portion of the Debtor's premises for stock auto races, be cancelled and declared null and void". Decision on that counterclaim is still pending, having been reserved, together with certain creditors' claims, pending a final determination of the financial interest of the various so-called stockholders. It might also be noted that there was filed, on December 1, 1956 with Referee John E. Joyce, by Ida Mae Margolis *et al.*, a specific prayer that the "lease" in question be delivered up and cancelled and an accounting be had thereon from the time respondent Fried acquired the same to that time.

(8) and (9) This court lacks jurisdiction over respondent Nazareth Enterprises, Inc., a Pennsylvania corporation, because it is not located in the Southern District of [fol. 381] New York. If this defense is addressed to the court's jurisdiction to determine the rights of Nazareth Enterprises, Inc. under the "lease", it has already been disposed of in the treatment of the fourth defense. If, however, it is addressed to personal jurisdiction over Nazareth Enterprises, Inc., it is disposed of in the treatment of Fried's comparable defense, *infra*.

(10) The debtor and Nazareth Enterprises, Inc. modified the rentals under the lease. As appears *supra* in treating with this respondent's 6th defense and as will further appear hereinafter the claimed modification is rejected.

(11) The debtor benefited by the modification of the "lease". This defense must be rejected out of hand. It is obvious that if the debtor was entitled as hereinabove and hereinbelow held, to 15% of the front-gate, if it got any less, no matter how much it got over and above what it got the year before, it did not benefit.

(12) Respondent Nazareth Enterprises, Inc. had the right to sell prepared foods on "racing" days. This defense is valid and I so herein hold, *infra*.

(13) Respondent Nazareth Enterprises, Inc. allowed J & J and LaGrotte to pay rentals due it to the debtor in

1953 and 1954 to help the debtor's financial needs. The debtor was entitled to the rentals from the food concessions in 1953 and 1954 without any grace by the said respondent because during those years the said respondent chose not to exercise the food vending privilege and paid only 12% rental upon that election.

(14) Respondent Nazareth Enterprises, Inc. had the right to retain rentals from J & J and LaGrotte from food sales on "racing" days. This is a valid defense but concomitant with that right is the obligation as herein held to pay debtor in possession the full percentage of rental called for by the agreement.

* * * * * * *

[All Asterisks Appearing in this Decision are the Court's.]

[fol. 382] Fried in his answer adopts all of the defenses interposed by Nazareth Enterprises, Inc. The prior treatment of the defenses interposed by respondent Nazareth Enterprises, Inc., is of course applicable to respondent Fried where he pleads a defense by incorporation of that of his corporate co-respondent.

Fried adds the defense that the court lacks jurisdiction of his person because he is a Pennsylvania resident. This issue has already been resolved above in the treatment of the 9th defense of the respondent Nazareth Enterprises, Inc. insofar as it addresses itself to the court's jurisdiction to determine rights under the agreement.

However, if it is intended to go beyond that and challenge the court's power to direct the payment by respondents of the additional rental herein provided for, then the short answer is (1)(a) as to Fried he has been held to be a fiduciary of the debtor in possession and is therefore answerable to this court no matter where he may be found; (b) furthermore, Fried has waived any objection to the jurisdiction of this court by his actions in the proceeding, Bankruptcy Act §2a(7) [11 U. S. C. §11a(7)]; and (2) as to Nazareth Enterprises, Inc., it is indicated *infra* that the corporate shell is the alter ego of Fried and his answer-

ability is that of the corporation; *cf. May* v. *Henderson*, 268 U. S. 111 (1925).

• • • • • • •

The debtor in possession filed an answer in which it raised two affirmative defenses. The first challenges the right of the petitioner or his principals without court authorization to maintain or prosecute this proceeding. That has already been disposed of in treating with the 2nd defense of respondent Nazareth Enterprises, Inc. The second appears to urge that under §167(3) of the Bankruptcy Act [11 U. S. C. §567(3)] the examiner must first investigate and report to the court, whereupon the court must determine whether it will allow this proceeding. The [fol. 383] statute requires the examiner to "report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate". It is unnecessary for the examiner to make such report with respect to matters on which the debtor in possession has taken action, as in this case. It will be recalled that the debtor in possession has heretofore put in issue the validity of the lease to Nazareth Enterprises, Inc. and that matter is as yet unresolved. Moreover, the statute refers to causes of action available to the estate at the date of the filing of the reorganization petition and therefore would not cover any wrongdoing committed subsequent to the filing of the reorganization petition. Apart from these facts, however, certainly a recommendation by the examiner is not a condition precedent to the bringing of this proceeding by the petitioner who has as aforesaid been held to have the right to do so.

• • • • • • •

Respondent Arnold A. Weinstein interposed an answer to the petition for accounting and surcharge, which as above indicated became part of the ultimate issue tried. In that answer he made reference to orders to show cause granted on January 7, 1960, predicated upon petitions sworn to January 5 and January 6, 1960. Obviously any answer to the petition sworn to January 5, 1960 is of no moment in the instant proceeding. Only the petition of

January 6, 1960 is pertinent because that was the one superseded by the amended petition of September 12, 1960, which remained part of the consolidated issue now before the court.

Arnold Weinstein's answer contains only one defense which can be considered pertinent to this issue and that is the third defense of his answer, as verified September 12, 1960. In that defense he urges that the modification entered into between him and respondent Nazareth Enterprises, Inc. in the latter part of 1956 was for the debtor's [fol. 384] benefit and to its profit. In dealing with the answers of the other respondents, those arguments have already been rejected. However, Weinstein further as part of his third defense aforesaid alleges that he did not personally profit from the modification. The court so finds and as elsewhere herein appears denies petitioner any relief against respondent Weinstein.

* * * * * * * *

The respondents Nazareth Enterprises, Inc. and Fried's counterclaims are dismissed because they would arise only if the agreement were rejected or cancelled.

Although the petitioner filed a defense to the counterclaims of respondents Nazareth Enterprises, Inc. and Fried no treatment thereof is necessary because of the dismissal of the counterclaims.

* * * * * * *

The pleadings and the proof present these substantive issues for resolution:

1. The nature of the document involved.
2. Should the document be cancelled for fraud
   (a) prior to the Chapter X petition
      (i) in the inception of the document;
      (ii) in the extension of its term;
   (b) subsequent to the Chapter X petition?
3. Should the document be rejected as burdensome to the debtor in possession under §116(1) of the Bankruptcy Act [11 U. S. C. §516(1)]?

1. The Nature of the Document Involved.

Although throughout the pleadings, the testimony and the argument the document to which this consolidated proceeding is addressed is referred to as a "lease" and in [fol. 385] form it appears to have all of the attributes of a "lease", I hold it to be no more than the parties intended and acted upon it to be, namely, a license granted by the debtor to Sherman and his assignee Nazareth Enterprises, Inc. to run automobile races and events on the debtor's track at the debtor's property at such times as the debtor was not conducting market days, i.e., did not open its property to the public for the sale of merchandise and services by the debtor's concessionaires and tenants.

2. (a) Should the Document Be Cancelled for Fraud Prior to the Chapter X Petition

(i) in the inception of the document;

(ii) in the extension of its term?

It is my view that petitioner has failed to establish fraud, with the required degree of certainty, either in the inception or the extension of the document that would warrant its cancellation.

(i) Assuming, as petitioner contends, that respondent Fried was acting for both the Malakoff interests and as a secret partner of Sherman when the original letting was entered into, the terms of the document (on the basis of what was learned during the trial as to the usual terms of agreements of this kind) seem to be fair. Furthermore Fried obtained the ratification of the Malakoffs after he, on behalf of the then controlling interests, entered into the agreement between the debtor and Sherman. Standing by itself, Fried's dual capacity excited enough suspicion that cast upon him the burden, which as above indicated he sustained, of justifying the fairness of the arrangement under the then existing circumstances. The value of the race track privilege at the market in 1952 when the agreement was made was far less than the value of that privilege in 1960 because of what had been developed in the intervening years.

[fol. 386] (ii) I reject the petitioner's contention that the "lease" was fraudulently altered to effect an extension of the term of the "lease". While it is true that a photostat first came into evidence during the Fried creditor claim (Margolis Exhibit C), that appeared to have had the term extended in the pen and ink fill-in from either 1952 or 1953 to 1962, the later production of the original agreement (Debtor's Exhibit 2, in this proceeding) even under the improbable circumstances explaining its absence until that time, is persuasive that the original letting was for the ten-year period. His assignment of the agreement to respondent Nazareth Enterprises, Inc. on April 28, 1953, belies Sherman's testimony that the original document was for only one season or until a few months after the assignment in 1953.

2. (b) Should the Document be Cancelled for Fraud Subsequent to the Chapter X Proceeding?

Petitioner predicates this branch of the relief sought upon the contentions that

(i) Any "modification" of the agreement required prior approval by the Chapter X court;

(ii) The oral agreements among Fried, Weinstein, and LaGrotte were and are voidable under the Statute of Frauds, and effected a continuing fraud on the debtor;

(iii) The food concession rents during race track exhibitions belong to the debtor, not to respondents;

(iv) Under the agreement "gross admissions" include the "back-gate" receipts.

(i) I agree that the modification of the percentage as rental required prior approval by the Chapter X court. There is conflict in the record as to when this oral modifica- [fol. 387] tion took place between Weinstein and Fried. I accept the version that it became effective with the beginning of the 1957 season. I cannot at this time say whether I would or would not have approved the modification if it had then been submitted. I cannot say now whether I

might have been influenced by Fried's statement that he was prepared to abandon the whole enterprise unless he got relief. I cannot say now whether I would have approved the arrangement that contemplated a change in the food concession operation assuming it to be necessary [*cf.* 2(b)(ii) and (iii) *infra*] and a change in the rental, predicated upon the amount of purses.

In any event, I believe that the petition should be granted to the extent of requiring respondent, Nazareth Enterprises, Inc. and upon its default, respondent Fried, to pay rental at the rate of 15% for each of the years 1955 and subsequent thereto.

I do not believe that Weinstein can be held accountable for any loss of the income sustained by the debtor as a result of the rent modification made without the prior approval of the court. I believe that in doing so he thought he was acting in the best interests of the debtor in order to retain whatever rental was being realized from the automobile exhibitions and that he personally is not answerable for the failure to procure court approval inasmuch as he did not personally benefit financially in any respect whatsoever.

Fried, however, is in a different position, because he and Nazareth Enterprises, Inc. are in essence one and the same. When the modification of rental took place Fried was the general manager of the business of the debtor in possession; the corporate co-respondent wholly owned by him and his wife had a written agreement which he has insisted all along is binding upon the debtor as well as upon him; he was charged with knowledge that Weinstein lacked authority to make an oral modification of that agreement without prior court approval; and he and his corporate [fol. 388] co-respondent were the only beneficiaries in pocket of the modification.

The basis of the assessment against Nazareth Enterprises, Inc. and upon its default Fried, of the difference between the rental paid and the rental due beginning with the 1957 season is predicated solely upon the failure to obtain the court's approval, it being my opinion that so radical an alteration in the terms of the agreement was not that of the ordinary operation of the business allowed to the

debtor in possession without court approval, under the original order continuing it in possession and particularly when this agreement was between the debtor and its general manager, a fiduciary.

The requirement that respondent Nazareth Enterprises, Inc. also pay the difference between 15% and the rent paid for the earlier years of 1955 and 1956 is entirely aside from the modification which occurred effective in 1957. Respondent Nazareth Enterprises, Inc. undertook to operate the food and drink concessions on automobile exhibition days for the 1955 and 1956 seasons and having done so was obliged to pay debtor in possession 15% of the gross admissions during those two years.

(ii) and (iii) The provision in the third paragraph of the assigned agreement that the debtor was to receive 12% of the gross admissions except on those days when Nazareth Enterprises, Inc. operated the food concessions when the debtor was entitled to 15% of the gross admissions, implicitly allows Nazareth Enterprises, Inc. to determine whether it will operate the food concessions on automobile exhibition days. If it chooses so to do, it must pay the 15%. If not, its rent is 12%. It chose so to do and I reject the petitioner's technical argument that it had to physically operate the concessions itself. It had the right on any basis whatsoever to delegate the supplying of food and drink to anyone whom it chose. The only restriction imposed, if it availed itself of the privilege of operating the food concessions, was to increase its rental from 12% to 15%.
[fol. 389] I therefore believe that the petitioner has failed to establish fraud in the oral agreements regarding the food concessions on automobile exhibition days and in the assertion that because of that fraud the concession rents belonged to the debtor and not to respondent Nazareth Enterprises, Inc.

(iv) From the testimony I am satisfied that "gross admissions" do not include the back-gate receipts. However, the debtor in possession is accorded the right to alter the present practices at both the "front" and "back" gates on automobile exhibition days to assure that it is receiving proper rental under the agreement.

3. Should the document be rejected as burdensome to the debtor in possession under 116(1) of the Bankruptcy Act [11 U. S. C. 516(1)]?

While I agree that the court may authorize rejection in a proper case, I do not agree with the petitioner that it would be in the best interests of the debtor to now reject the agreement. Very little advantage would accrue to the debtor in possession (in the light of the surcharge of the difference in rental for the period commencing with the 1955 racing season) in having Marshman or Crist operate the automobile exhibitions. I am persuaded that the best interests of the debtor will be served by permitting respondent Nazareth Enterprises, Inc. to continue to operate, at least for the balance of the 1961 racing season, particularly because the 1961 racing season has now commenced, but more specifically because the proposals suggested by the petitioner or others do not appear to offer substantially enough, if anything, to warrant ousting respondent Nazareth Enterprises, Inc. from the operation it has been conducting for these many years.

The foregoing shall constitute the court's findings of fact and conclusions of law.

[fol. 390] The examiner is directed to settle an order, on notice, consistent herewith.

Dated: New York, New York, June 28, 1961.

Sidney Sugarman, United States District Judge.

[fol. 1]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Bankruptcy 89669

In the Matter

—of—

NAZARETH FAIR GROUNDS & FARMERS MARKET, INC.

Before:

HON. SIDNEY SUGARMAN,

District Judge.

Transcript of Testimony—New York, May 19, 1958

10.30 o'clock a.m.

APPEARANCES:

Rosen & Rosen, Esqs., Attorneys for Debtor; Alex L. Rosen, Esq., of Counsel.

Charles Seligson, Esq., Examiner, Charles Seligson, Esq., and David Mandel, Esq., of Counsel.

Melvin Lloyd Robbins, Esq., Attorney for Robert H. Davidson, Frederick Katzenell, Irving J. Wolf, Richard Hull, Ernest Pollak, Dorothy Kane, Ann Rosen and Wilson Rehrig.

Jacob Weiswasser, Esq., Attorney for Mae Bluestone and Alexander Fisher, as Assignee of Anna F. Bikalis.

[fol. 2] Herman R. Agins, Esq., Attorney for Blanche Waldman.

Nicholas Kohn, Esq., Attorney for Robert A. Noire.

Louis R. Patur, Esq., Attorney for Seymour Forman.

Solomon Gilbert, Esq., Attorney for Eskandar Manoochehrian; Sidney Bush, Esq., of Counsel.

Benjamin Margolis, Esq., Attorney for Benjamin Margolis, Ida May Margolis, Sarah Kason and Bernard L. Unger.

Jerome Fried, Esq., pro se and Aaron Fried.

Morton Samet, pro se.

Arnold A. Weinstein, pro se.

Milton Sanders, Esq., Attorney for Harry Forman.

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[fol. 69] Recross examination of
Mrs. Leslie Saul.

By Mr. Seligson:

Q. He just said that, "I want a thousand dollars a share for the stock in this corporation"?

A. And that he would issue stocks for it.

Q. And you agreed to buy three shares at a thousand dollars per share.

A. Yes, sir.

Q. Now, the letter, which is Claimant's Exhibit 5, states that you were to receive dividends at the rate of 20 per cent per annum, payable monthly.

A. That's right.

Q. And there have been introduced in evidence a number of checks that you received.

A. That's right.

Q. Now, can you tell us the total that you received from Mr. Malakoff, allegedly by way of dividends?

A. I don't know exactly in dollars and cents. They were $50 a month, about $50 a month.

Q. But are they all represented by the checks that have been offered in evidence today?

[fol. 70] A. I think so.

* * * * * * *

[fol. 119] Cross examination of
Edward Malakoff.

By Mr. Robbins:

Q. Mr. Malakoff, you said that Richard Realty Company conveyed the property to Kipling Realty Company. Who were the stockholders of Kipling Realty Company?

A. Same as Richard Realty Company.

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[fol. 120] The Court: Now, am I to understand that the stockholders of Kipling Realty Company were the partnership as such?

The Witness: That's right.

The Court: The stock in Kipling was issued to the partnership?

The Witness: Yes, your Honor.

The Court: All right.

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By Mr. Robbins:

Q. Mr. Malakoff, did Kipling Realty Company subsequently convey the property to Nazareth Fair Grounds & Farmers Market, Inc.?

A. It did.

[fol. 121] Q. Do you remember the date?

Mr. Rosen: Your Honor, that is all a matter of record.

The Court: September 26, 1951.

Mr. Robbins: All right, fine.

Q. Now, do you remember, Mr. Malakoff, whether Nazareth Fair Grounds & Farmers Market, Inc., the debtor in this proceeding, was incorporated through your office?

A. Well, we had a Pennsylvania attorney form the corporation, yes.

Q. Mr. Malakoff, will you explain why the real estate was transferred from Richard Realty Company to Kipling Realty Company, and then from Kipling Realty Company to Nazareth Fair Grounds & Farmers Market, Inc.?

• • • • • • •

[fol. 122] A. It is our normal practice in acquiring real estate, where a mortgage is going to be created, to take

title in Richard Realty Company, thereby putting that corporation, Richard Realty Company, on the bond and mortgage, subsequently transferring it to Kipling Realty Company. Kipling Realty Company has never executed any bond or mortgage. The purpose of holding title in Kipling Realty Company is because of the fact that Richard Realty Company has executed many, many mortgages; so we just transfer it out of there.

Mr. Robbins: All right.

The Court: I take it, then, that Kipling never assumes any of the mortgages executed by Richard?

[fol. 123] The Witness: That is correct.

* * * * * * *

[fol. 126] Cross examination.

By the Court:

Q. Mr. Witness, you were at the conference, Mr. Malakoff, John Malakoff, was there, and your father was there.

A. Right.

Q. What was said by each one?

A. John Malakoff offered to buy the real estate at the price that we paid for it, plus $30,000, plus another $2800, which covered expenses that had been put into the property by his title expenses and a few other things, he was [fol. 127] to take over the deal and he started making payments.

* * * * * * *

[fol. 139] Cross examination.

By Mr. Robbins:

Q. Did you have any agreement with John Malakoff as to the balance of the moneys due from him to you?

A. None.

Q. No agreement?

A. No agreement.

Q. What is the balance due?

A. I couldn't tell you without actually figuring it out. It would have to be somewhere around $30,000.

Mr. Rosen: May I object—I have a standing objection, your Honor, to all this testimony.

The Court: Yes.

Mr. Robbins: That is all I want to ask the witness, your Honor.

The Court: I understand, however, that you assert no claim against the debtor.

The Witness: That's right.

The Court: What did you say?

The Witness: That is correct.

• • • • • • •

[fol. 144] Cross examination.

By Mr. Margolis:

Q. Now, isn't it a fact that in July of 1951 you referred to a certain conference that your late uncle, John Malakoff, had a one-fourth interest in the partnership at that time?

A. In what partnership?

Q. In the partnership in which Mr. Zoloth was in, Mr. Soble and Murray Realty.

A. That is not so.

Q. Would you say there was no payment or agreement made by Malakoff in July 1951 to pay you about $16,000? When I say "you," I mean Murray Realty.

A. I gave you the dates of the—the exact dates of all the payments that were made.

Q. Well, I ask you now if it isn't a fact that that $16,000, which was to be credited to your late uncle, was for a one-fourth interest in the partnership, and that agreement was prior to October 1951?

A. That is not so.

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[fol. 148] Redirect examination.

By Mr. Rosen:

Q. Did you have a discussion with John Malakoff about the fire loss that Nazareth Fair Grounds & Farmers Market, Inc. had?

A. Yes.

Q. And you know that the fire loss was incurred by Nazareth Fair Grounds & Farmers Market, Inc.?

A. Right.

Q. Not by John Malakoff, personally?

A. Right.

Q. That is correct?

A. Right.

The Court: What fire loss is that?

The Witness: It is our fire loss, wind—it is not fire loss, it is windstorm.

Mr. Rosen: I am coming to that.

The Court: You are coming to what?

Mr. Rosen: Windstorm loss.

Q. When did this windstorm—to your knowledge, when did this windstorm loss occur?

[fol. 149] A. Probably late in '51.

Q. And after the windstorm loss, you became apprised that there was certain insurance payable to Nazareth Fair Grounds & Farmers Market, Inc.?

A. Right.

Q. Then you had a conversation with John Malakoff; correct?

A. Yes.

Q. Did you ask John Malakoff that that check from the insurance company, when payment is made, should be turned over by the corporation to you?

A. That's right.

Q. Is that what transpired?

A. That is what transpired.

Q. Now you knew you were taking a corporation check.

A. Right.

Q. And not Malakoff's personal check.

A. Right.

Q. And you knew that was property of the corporation.

A. Right.

Q. Is that correct?

A. Right.

* * * * * *

[fol. 153] Cross examination.

By Mr. Seligson:

Q. Now I also understood you to say that all of the capital stock of Richard Realty Company was owned by the Murray Realty Company; is that right?

A. That is correct.

Q. And did you not also testify that you and your father made up the Murray Realty Company?

A. That is correct.

Q. Well, now, what does Soble and what does—what is the other name?

Mr. Rosen: Zoloth.

A. Zoloth.

Q. —have to do with the Richard Realty Company, or the real estate, as of that time?

A. Well—

Q. Were they involved in the deal at that time, in March of 1951?

A. Yes.

Q. Well, what interest did they have?

A. Zoloth is the same as Murray Realty Company. That is my brother-in-law. Soble was a partner with us in this transaction. We used Richard Realty Company for purposes of taking title, and Kipling for purposes of holding title. But in actuality the real principals were two parties.

[fol. 154] Q. Two groups?

A. That's right. One group was Murray Realty Company, my dad and myself, and the other group was Soble—

Q. Soble and Zoloth had a 50 per cent interest.

A. Each.

Q. In the deal with the Murray Realty, which was you, and your deal; is that right?

A. No. Soble had a 50 per cent interest in the deal. Zoloth is the same as Murray Realty Company, had a 50 per cent interest of it, too.

Q. Is Zoloth a member of the partnership?

A. Zoloth is my brother-in-law.

Q. Was he a member of the partnership?

A. No.

Q. But he was in on the Murray Realty?
A. That's right.

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[fol. 181] Direct examination of
Miss Tess J. Schwartz.

By Mr. Rosen:

Q. Miss Schwartz, would you kindly tell the Court the date, the place, the circumstances and the conversations had which resulted in your acquiring three shares of Nazareth Fair Grounds & Farmers Market, Inc. stock?

A. I purchased these in March 1953. My brother and mother both had the same stock and I decided that I would have some too, that I would want to buy some. I was living in Florida at the time. I sent my brother a check to purchase the three stocks for me. I had never had any conversations with anybody else but my family.

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[fol. 197] HAROLD B. SCHWARTZ, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

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[fol. 200] And I have the check right here that I made out to John Malakoff for two shares in the Nazareth Farmers Market.

Subsequently I purchased two more shares.

* * * * * * *

[fol. 251] Q. Will you kindly state time, place, who was [fol. 252] present, conversation, with whom, which resulted in the acquisition of two shares of stock of Nazareth Fair Grounds & Farmers Market, Inc., represented by certificate No. 30 drawn on behalf of Gussie Schwartz.

A. On approximately—on the same date as—on approximately somewheres between January 10 and January 14—correction—on January 14th, while at a reception given

by one Helen Bernstein at the Waldorf-Astoria, I gave a check in the amount of $2,000 for the purchase of two shares of Nazareth Fair Grounds & Farmers Market stock for one Gussie Schwartz, my mother.

I presented the check to Miss Helen Bernstein and drew the check to her order, since I asked her if I could purchase some more stock and she said yes. And I said, "Should I make out the check to the Farmers Market?"

She said, "No, make it out to me."

I have the check here in evidence. I also noted on the back that it was for investment in the Nazareth Farmers Market for Gussie Schwartz for two shares. I have the check and the—

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[fol. 298] Cross examination of
Miss Dorothy Kane.

By Mr. Rosen:

Q. When you purchased these three shares of stock you were purchasing Malakoff stock?

A. I was purchasing stock from Mr. John Malakoff for Nazareth, for the stock supposedly to be for the Nazareth Market.

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[fol. 343] George H. Bond, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

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[fol. 346] The Witness: • • •

A. (Continuing) Friends of mine were talking about Nazareth Market and they thought it was a good investment, and I thought I would invest and buy one share. That's all.

Q. Will you, on behalf on the claimant, will you tell the Court who you spoke to regarding the acquisition of the

share and who you paid, and who delivered the share of stock to you?

A. Share of stock was mailed to me but I never met Mr. Malakoff myself personally. I gave the check to—my check to Harold Masur.

Q. Mr. Masur was your intermediary or agent?

A. Yes, because he was one of my friends. He told me about the stock. So I gave him the check and he turned it over to Nazareth Market, and then I got a certificate.

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[fol. 468] Cross examination of
Harold Q. Masur.

By Mr. Seligson:

Q. At the time you gave him this check for $3,000 was it supposed to represent payment for three shares of stock?

A. Three shares of stock, yes, sir.

Q. And what stock were you buying or whose stock were you buying?

A. I assumed I was buying stock in the corporation; I was buying it from Mr. Malakoff in whatever capacity he represented the corporation, I don't know.

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[fol. 469] Q. Isn't it a fact, Mr. Masur, that you thought you were buying a proportionate interest in the Market and not buying stock?

A. Yes, I believe that would be a fairly accurate statement.

Q. So you didn't advance this $3,000 for the purchase of stock but in order to get a proportionate interest in the ownership of the Market?

A. I think that may be fair.

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[fol. 519] Lawrence Treat, called as a witness in behalf of Blanche Waldman, being duly sworn, testified as follows:

Direct examination.

By Mr. Agins:

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[fol. 522] A. (Continuing) I went there with my wife and expressed a desire to invest in the Nazareth Farmers Market, which I had heard, and we chatted, and Mr. Malakoff [fol. 523] painted the proposition in very glowing terms, and he said that he had recently acquired it and that the setup was not yet crystallized and he, therefore, gave me a letter in return for a check, stating that the stock certificates and so on were not yet available. As I recall it, it was rather complicated, and I didn't understand the various explanations, but that was the substance of it.

Q. In other words, at that first meeting with Mr. Malakoff you purchased some interest in this proposition?

A. Yes.

Q. What was the extent of that interest?

A. Two 2/100ths.

Q. The amount—

A. Earmarked—

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[fol. 595] Blanche Waldman, called as a witness in her own behalf, being first duly sworn, testified as follows:

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[fol. 601] Direct examination.

By Mr. Agins:

Q. Did you handle the details of the purchase of these 6 shares of stock from these two parties?

A. No, my brother handled it.

Q. Your brother's name is Arnold A. Weinstein?

A. Yes, sir.

Q. And he is an attorney, is that correct?

A. Yes, sir.

Q. Are you familiar with the details of the transaction?

A. No, he handled the whole thing for me.

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[fol. 607] Cross examination.

By Mr. Seligson:

Q. Who suggested to you for the first time that you [fol. 608] should make an investment in the stock of Farmers Market?

A. My brother.

Q. When did he do that?

A. He called me up about a year ago, I would say.

Q. That would be about in May of 1957?

A. In May some time. I don't know the exact day, but I know it was in the spring of the year, and he said that there were some people that wanted to sell their stock in the Market.

I had been out at the Market on various occasions and he advised me, that is, he thought it would be a very good investment if I would be interested in buying the stock. I asked him how many shares were involved and how much it was.

Q. And what did he tell you?

A. He told me it would be $1,000 a share and that there were six shares involved, if I wanted to buy.

Q. Did he tell you that the first time that he called you to talk to you about this investment?

A. Yes.

Q. He told you about the six shares at one time, at the same time?

A. Yes.

[fol. 609] Q. Did he ask you whether you wanted to make an investment to buy that stock at $1,000 per share?

A. Yes.

Q. And what did you say to him?

A. I thought it over very quickly and I said yes.

Q. Right on the telephone, right then and there?

A. Yes, sir.

Q. Did he ask you whether you had the money available to buy the stock?

A. He knew I had the money available.

Q. What is that?

A. He knew I had the money available.

Q. Did you tell him that it would be necessary for you to sell some stock, other stock, in order to pay for the purchase price of these 6 shares?

A. Well, my brother knows my financial position and he is aware of what I own and what I don't own.

Q. Then was anything said about your having to sell other stock in order to buy this stock?

A. He didn't tell me to do anything. He just advised me that it might be a good investment for me. I made the decision myself to buy.

Q. Did he handle your affairs, your financial affairs?

[fol. 610] A. He gives me very good advice.

Q. But does he handle investments for you?

A. He has on occasions when I was a widow, he did.

Q. Now in your discussion with him did he tell you or did you ask him who it was who wanted to sell the stock?

A. I didn't ask him and he didn't tell me. This is the first time I ever met these people.

Q. In other words, you left everything to your brother?

A. Yes, I relied on him.

Q. You relied completely upon your brother?

A. Yes, I did and I do.

Q. That is understandable.

A. Right.

Mr. Weinstein: That is the kindest word I heard today.

Mr. Seligson: What is that?

Mr. Weinstein: I said that that is the kindest word I heard today.

Q. He simply called you and suggested that it would be a good investment and you made a decision right off the bat, so to speak?

[fol. 611] A. Yes, sir.

Q. On the telephone?

A. Yes, sir.

Q. And you said, I suppose, "If you think it is a good investment I will go along with it," or something like that, is that it?

A. Exactly like it.

Q. And the matter was handled completely by him?

A. Yes.

Q. And you didn't know where the stock was coming from?

A. No, sir.

Q. You didn't know anything about the allowance or disallowance of the stock in court and you asked no questions about it?

A. I trusted my brother and I trust my brother implicitly.

Q. I don't blame you for trusting your brother, that is a natural thing.

A. Right.

Q. And you didn't suggest or tell him that in order to buy this stock you would also have to cash government bonds?

A. No, it wasn't necessary to tell him that.

[fol. 612] Q. I just want to know whether you did or whether you did not, that is all.

A. He asked me if I would be interested in buying. I asked him when I would need the money and I arranged to give him the money.

Q. Without discussing where you were to get the money?

A. No, I didn't tell him where I was going to get the money.

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[fol. 613] Cross examination.

By Mr. Weinstein:

Q. Mrs. Waldman, did any part of the $6,000 that you delivered to me in the form of a check to my order as attorney in any way emanate from me or from any of my bank accounts or cash, to your knowledge?

A. It did not; it was all my money.

Q. In other words, are you assuring this court that the funds which you delivered to me as attorney were wholly and solely your own?

A. They were completely my own.

Q. And that I had nothing to do with respect either to the payment or the delivery of that money to myself; is that right?

A. Absolutely right.

Mr. Weinstein: That is all.
Mr. Agins: That is all, Mrs. Waldman.

(Witness excused).

ARNOLD A. WEINSTEIN, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Agins:

Q. You are an attorney-at-law?
[fol. 614] A. I am.
Q. Duly licensed to practice law in the State of New York?
A. I am.
Q. Are you also the brother of Blanche Waldman?
A. Yes, I am.
Q. Did you superintendent the transaction or the two transactions whereby Mrs. Waldman purchased certain shares of stock from Mr. Masur and from Lawrence Treat?
A. I did.

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[fol. 622] The Witness: When the transaction was consummated, in so far as complete payment was made to Mr. Masur and to Mr. Treat, it should be borne in mind that I had received $6,000 from Mrs. Waldman which I had deposited into my special account. However I had not [fol. 623] exhausted that fund of $6,000 from my special account by reason of the fact that I had previously advanced out of my regular account the sums of money which were given to Mr. Treat and Mr. Masur on account of the option agreement which I had prepared. And so at the end of the transaction I drew a check to myself out of my special account for $340 and deposited that into my regular account in repayment of the funds that I had expended in connection with this transaction.

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[fol. 624] Cross examination.

By Mr. Rosen:

Q. Mr. Weinstein, you are president of the debtor?

[fol. 625] A. Yes, sir, I am.

Q. Mr. Weinstein, you know that as president of the debtor that you are a fiduciary?

A. I appreciate that.

Q. Mr. Weinstein, do you know as president of the debtor and that as a fiduciary you are not supposed to go out on the market and purchase stock of the debtor?

A. Yes, sir.

Q. Yet you purchased this particular stock?

A. Not for myself.

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Q. Mr. Weinstein, do you know that even if there is a family relationship, whether it is a sister or any other type of close relationship, you are not supposed to use your fiduciary knowledge or your office to purchase any stock [fol. 626] of the debtor?

A. I did not use my fiduciary capacity to purchase any stock of the debtor for myself or any member of my family. The fact of the matter was that I did my very, very best to discourage the sale by Mr. Masur and Mr. Treat.

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[fol. 828] Barry Clark, called as a witness in his own behalf, being first duly sworn, testified as follows:

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[fol. 830] Direct examination.

By Mr. Rosen:

Q. Mr. Clark, will you kindly tell on your behalf as claimant, date, time, place, who was present and the conversations which emanated in your acquiring four shares of stock of the debtor.

A. Well, the dates are vague to me, but it seems like early in 1951 it was through Harold Q. Masur that I met Helen Bernstein and John Malakoff. And it was about—well, it was about six months later that John Malakoff asked me to buy some stock in the Nazareth Farmers Market. The price was $1,000 a share. I agreed and I bought at that

time—I bought three shares, and about a month later I bought another share.

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[fol. 881] HELEN ROTHSCHILD or HELEN BERNSTEIN, called as a witness on behalf of the debtor, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rosen:

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[fol. 911] A. He said that— I said, "How did you get into this thing, Mr. Robbins?"

And he said, "I represent a man who is a butcher at this [fol. 912] Nazareth Market and he hasn't been able to get a satisfactory lease, and that is the reason he placed $50,000 in my account and authorized me to buy stock in the Nazareth Farmers Market, but he didn't have all that money himself. He has a partner, a lawyer, by the name of Phillips, who comes from somewhere up in that area, who recommended me for this purchase of the stock, "for this transaction," or something. And he said, "If you don't mind, you have been a mystery woman in this whole thing. I have heard your name mentioned for the last year and a half, but I have never met you before, and you appear to be some kind of a myth in this Nazareth Market situation."

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[fol. 935] He said, "As a matter of fact, my tenant, my client, is willing to go as high as $8,000 a year rent."

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[fol. 1090] Cross examination.

By Mr. Margolis:

A. All I can tell you, Mr. Margolis, is that Mr. Malakoff [fol. 1091] always needed money, whether he needed it for rent in the Wales or the Margaret, or whether he needed it for dividends, or 20 per cent, or whatever he needed it for. He needed money every single day he lived. I wouldn't remember a discussion about any particular rent. He always needed money.

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